No. 18-315	
Title:	Cochise Consultancy, Inc., et al., Petitioners v. United States, ex rel. Billy Joe Hunt
Docketed:	September 11, 2018
Linked with 17A1390	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-12836)
Decision Date:	April 11, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 19 2018	Application (17A1390) to extend the time to file a petition for a writ of certiorari from July 10, 2018 to September 8, 2018, submitted to Justice Thomas. **Main Document** **Proof of Service** **Lower Court Orders/Opinions**
Jun 28 2018	Application (17A1390) granted by Justice Thomas extending the time to file until September 8, 2018.
Sep 07 2018	Petition for a writ of certiorari filed. (Response due October 11, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 03 2018	Blanket Consent filed by Petitioners, Cochise Consultancy, Inc. and The Parsons Corporation. **Blanket Consent**
Oct 04 2018	Blanket Consent filed by Respondents, United States of America ex rel. Billy Joe Hunt. **Blanket Consent**
Oct 11 2018	Response to petition from respondent United States of America ex rel. Billy Joe Hunt filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 11 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 23 2018	Reply of petitioners Cochise Consultancy, Inc. and The Parsons Corporation filed.

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Oct 24 2018	DISTRIBUTED for Conference of 11/9/2018.
Nov 13 2018	DISTRIBUTED for Conference of 11/16/2018.
Nov 16 2018	Petition GRANTED.
Jan 02 2019	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Jan 02 2019	Brief of petitioner Cochise Consultancy, Inc. and The Parsons Corporation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 02 2019	Blanket Consent filed by Respondent, United States of America ex rel. Billy Joe Hunt **Blanket Consent**
Jan 03 2019	Blanket Consent filed by Petitioners, Cochise Consultancy, Inc. and The Parsons Corporation. **Blanket Consent**
Jan 07 2019	Brief amicus curiae of Joel D. Hesch filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 09 2019	Brief amicus curiae of Coalition for Government Procurement filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 09 2019	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 09 2019	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 09 2019	Brief amici curiae of DRI-The Voice of the Defense Bar, and the Professional Services Council-The Voice of the Government Services Industry filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 25 2019	SET FOR ARGUMENT on Tuesday, March 19, 2019
Feb 01 2019	Brief of respondent United States of America ex rel. Billy Joe Hunt filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 08 2019	Brief amicus curiae of United States filed. **Certificate of Word Count** **Main Document**

Feb 08 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Feb 08 2019	Brief amici curiae of Indiana and 19 Other States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 08 2019	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 08 2019	Brief amicus curiae of The National Whistleblower Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	CIRCULATED
Feb 21 2019	Record requested from the U.S.C.A. 11th Circuit.
Feb 25 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 28 2019	The record from the U.S.C.A. 11th Circuit is electronic and located on PACER. The record is complete.
Mar 04 2019	Reply of petitioner Cochise Consultancy, Inc. and The Parsons Corporation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
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No.

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act establishes two distinct statute-of-limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Neither The Parsons Corporation nor Cochise Consultancy, Inc. has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Parsons Corporation ("Parsons") and Cochise Consultancy, Inc. ("Cochise") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing this petition until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

STATEMENT

In the decision below, the Eleventh Circuit acknowledged that it was exacerbating an existing circuit split by departing from the two prevailing interpretations of the False Claims Act's statute of limitations in 31 U.S.C. § 3731(b)(2). According to the Eleventh Circuit, a private individual who files suit on behalf of the government as a False Claims Act relator can invoke the statute of limitations in Section 3731(b)(2)—which runs from the "date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even where the United States has declined to intervene in the suit. 31 U.S.C. § 3731(b)(2); *see also* Pet. App. 54a. As the Eleventh Circuit recognized, that holding "is at odds with the published decisions of two other circuits," which limit the availability of Section 3731(b)(2) to False Claims Act suits filed by the government or in which the government has intervened. Pet. App. 21a (citing decisions of the Fourth and Tenth Circuits). The Eleventh Circuit then went on to hold that, where the United States declines to intervene, the relator does not constitute the relevant "official of the United States" whose knowledge triggers the statute of limitations in Section 3731(b)(2), "reject[ing] the Ninth Circuit's interpretation" to the contrary "as inconsistent with th[e] text" of the statute. *Id.* at 30a.

This three-way circuit split has profound practical implications for False Claims Act litigants. If this suit had been filed in any of five other circuits, it would have been dismissed as time-barred, but, without this Court's review, it will be permitted to proceed under the Eleventh Circuit's novel interpretation of Section 3731(b)(2). This Court should grant review to restore uniformity to the False Claims Act and to prevent the inequitable and congressionally unintended consequences that the Eleventh Circuit's reading of Section 3731(b)(2) would impose on False Claims Act defendants.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). The False Claims Act has been amended on multiple occasions since then, and, in its current iteration, it imposes civil liability in the form of treble damages, as well as civil penalties, on persons who make false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a); *see also* 28 C.F.R. § 85.3(a)(9) (inflation adjustment establishing civil penalties of up to $11,000 per claim for violations before November 2, 2015).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by private persons, known as relators, who sue on the federal

government's behalf, *id.* § 3730(b).[1] A relator may recover up to 30% of the proceeds of a successful action, as well as attorneys' fees and costs. *Id.* § 3730(d). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. The government may then elect either to intervene in the suit or to allow the relator to continue the suit alone. *Id.* § 3730(b).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5 (Oct. 27, 1986). Before that date, the False Claims Act's limitations provision simply provided that "a civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258 (Sept. 13, 1982). The 1986 amendment created two distinct limitations deadlines: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2). In enacting that amendment, Congress incorporated into the False Claims Act the language and underlying policies of 28 U.S.C. § 2416(c), which

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[1] Section 3730(h) also creates a private right of action for individuals who believe they have been retaliated against by their employers for assisting in a False Claims Act investigation or proceeding.

tolls the generally applicable statute of limitations on claims filed by the United States when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c).

Although the statute of limitations in Section 3731(b) applies, without qualification, to any "civil action under section 3730," this Court held in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 550 U.S. 409 (2005), that Section 3731(b) does not apply where its application to a particular type of False Claims Act suit would lead to "counterintuitive results." *Id.* at 421. Specifically, the Court held that False Claims Act retaliation actions under Section 3730(h) should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1), because applying Section 3731(b)(1) could lead to the anomalous outcome of a claim's being "time barred before it ever accrues." *Id.*

2. Parsons is an engineering, construction, technical, and management firm that provides services to federal, regional, and local government agencies, as well as to private industrial customers worldwide. Parsons performed numerous contracts for the United States government during the Iraq and Afghanistan wars, including a U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the clean-up of munitions left behind by retreating or defeated enemy forces. Pet. App. 3a–5a. Cochise is a security-services firm that contracts with both the government and government contractors. Cochise was awarded a subcontract and task orders by

Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and Iraqi nationals, among others. *Id.*

Respondent Billy Joe Hunt is a former Parsons employee who worked in Iraq on the CMC contract. Pet. App. 3a–5a. In his complaint, he alleges that, "some time prior to January 2006 until early 2007," petitioners defrauded the United States in connection with the CMC security subcontract awarded to Cochise. Dist. Ct. D.E. 1 (Compl.) ¶ 89.

According to Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Hunt alleges, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id.* at 3a–4a. When the Parsons employees initially refused to issue the directive, Shaw allegedly forged one, *id.* at 4a, which Hunt claims to have personally observed, Dist. Ct. D.E. 1 (Compl.) ¶ 69.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id.*

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. Pet. App. 5a. As part of that interview, Hunt told the agents about the allegedly fraudulent scheme involving Cochise and Parsons relating

to the munitions-clearing project. *Id.* Hunt was charged with federal crimes for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed this False Claims Act suit against petitioners under seal on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a. The United States declined to intervene, and the complaint was thereafter unsealed. *Id.*

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. Pet. App. 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but maintained that the action was nevertheless timely under Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed the government of the alleged fraud during his 2010 FBI interview. *Id.*

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Acknowledging that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," the court held that the complaint was time-barred under either interpretation of Section 3731(b)(2) adopted by the courts of appeals.

Pet. App. 36a–40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations either was unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id.* at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed. The court held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened, but acknowledged that its conclusion was "at odds with the published decisions of two other circuits." Pet. App. 21a (citing *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the United States' knowledge of the alleged False Claims Act violation, not by the relator's knowledge. *Id.* at 29a–31a. In so holding, the Eleventh Circuit explicitly "reject[ed] the Ninth Circuit's interpretation" that a relator can be the relevant "official of the United States" under Section 3731(b)(2) "as inconsistent with th[e] text" of that provision. *Id.* at 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to

FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

Whether a suit has been filed before the expiration of the statute of limitations is a threshold question in every False Claims Act suit. But, as this case illustrates, the answer to that question will often depend on the jurisdiction in which suit is filed.

If the government has not intervened in a False Claims Act case filed in the Fourth, Fifth, or Tenth Circuits, a relator must file suit within six years of the alleged violation, as prescribed by 31 U.S.C. § 3731(b)(1), and is not permitted to invoke the distinct statute of limitations in Section 3731(b)(2). In the Third and Ninth Circuits, in contrast, the same relator may rely on Section 3731(b)(2), which authorizes suit up to ten years after the violation as long as the complaint is filed within three years of when the responsible "official of the United States" knew or should have known of the alleged fraud. 31 U.S.C. § 3731(b)(2). In those two circuits, the relator is considered to be the relevant "official of the United States" for purposes of Section 3731(b)(2). Thus, if Hunt had filed this suit in any of those five circuits, his complaint would have been time-barred because it is undisputed that he did not file suit until more than six years after the alleged False Claims Act violation and more than three years after he learned of that violation. *See* Pet. App. 5a–6a.

In direct and acknowledged conflict with those circuits, however, the Eleventh Circuit held that Hunt's

complaint should not be dismissed on statute-of-limitations grounds. The Eleventh Circuit first broke from the Fourth, Fifth, and Tenth Circuits by holding that Hunt may rely on the statute of limitations in Section 3731(b)(2) even though the United States has not intervened in this case. It then departed from the Third and Ninth Circuits by holding that the limitations period did not begin to run until the United States government, rather than Hunt himself, learned of the alleged fraud. Thus, a suit that would have been time-barred in every other circuit that has considered the issue (although under two conflicting rationales) was allowed to proceed in the Eleventh Circuit. Resolving that three-way circuit split—and eliminating the intolerable inconsistency that it has generated in the outcomes of False Claims Act litigation—is a compelling reason to grant review.

The necessity for this Court's intervention is underscored by the Eleventh Circuit's departure from the interpretive principles that this Court applied when construing Section 3731(b) in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005). *Graham* directs courts to construe the sometimes "imprecise[ ]" provisions of the False Claims Act within the broader context of the statute as a whole and in a way that will avoid absurd results. *Id.* at 418. Yet, the Eleventh Circuit ignored those considerations. In so doing, it adopted an interpretation of Section 3731(b)(2) that encourages relators to delay the filing of False Claims Act suits—an outcome that is directly at odds with Congress's statutory objectives—and that yields precisely the types of absurd results this Court sought to avoid in *Graham*.

This Court should grant review to eliminate the disuniformity in the circuits' application of Section 3731(b)(2)—which will inevitably generate forum-shopping, confusion, and arbitrariness—and to reject the Eleventh Circuit's flawed reading of that provision.

I. THERE IS A THREE-WAY CIRCUIT SPLIT AS TO WHETHER FALSE CLAIMS ACT RELATORS MAY INVOKE SECTION 3731(B)(2).

With the Eleventh Circuit's decision in this case, the federal courts of appeals have now reached three distinct and irreconcilable conclusions as to whether False Claims Act relators may invoke Section 3731(b)(2) where the United States has not intervened in the suit and, if so, whether relators are "official[s] of the United States" whose knowledge of the alleged fraud triggers the start of the limitations period. Review is warranted to provide an authoritative resolution to this sharply disputed question.

A. On one side of the split, the Fourth, Fifth, and Tenth Circuits have all held that the statute of limitations in Section 3731(b)(2) applies only in cases filed by the United States or in which the United States has intervened and that, in all other cases, relators must comply with the six-year statute of limitations established by Section 3731(b)(1).

In *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008), the Fourth Circuit relied on the False Claims Act's text, legislative history, and purpose to hold that Section 3731(b)(2) "extends the [False Claims Act's] statute of limitations beyond six years only in cases in which the United States is a party." *Id.* at 293. In so holding,

the Fourth Circuit relied on four principal considerations.

First, the court emphasized that the text of Section 3731(b)(2) "refers only to the United States—and not to relators"—thereby signaling Congress's intent "to extend the [False Claims Act's] default six-year period only in cases in which the government is a party." *Sanders*, 546 F.3d at 293. The limitations period in Section 3731(b)(2) starts "when the government knows or should know of 'facts material to the right of action,'" the court stated, which "makes perfect sense when referring to an action brought by the government." *Id.* at 293–94. But applying that language where the government has declined to intervene would "make[ ] no sense whatsoever," the court continued, because the government's knowledge of "facts material to the right of action" would not "notify the relator of anything" and thus could not "reasonably begin the limitations period for the relator's claims." *Id.* at 294.

Second, the Fourth Circuit looked to 28 U.S.C. § 2416(c), which "tolls the generally applicable statute of limitations in actions brought by the United States—and only by the United States—until 'facts material to the right of action' are actually or constructively known by an 'official of the United States charged with responsibility to act in the circumstances.'" *Sanders*, 546 F.3d at 294 (quoting 28 U.S.C. § 2416(c)). Congress sought to import Section 2416(c) into the False Claims Act through its 1986 amendments, further "support[ing] the conclusion that the text of Section 3731(b)(2) lengthens the [False Claims Act's] limitations period only when the government is a party." *Id.*

Third, in response to the relator's contention that the reference to a "civil action" in the prefatory clause of Section 3731(b) includes "all civil actions under the" False Claims Act, the Fourth Circuit emphasized this Court's conclusion in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), that the phrase in fact does not cover *all* civil actions under the Act. *See Sanders*, 546 F.3d at 294–95 (citing *Graham*, 545 U.S. at 411). The court of appeals explained that "[w]hen the phrase 'a civil action' is read in context, Section 3731(b)(2)'s restrictive language referring to the United States—and not to relators—makes clear that only a subset of civil actions may benefit from the extended limitations period in Section 3731(b)(2)—those in which the government is a party." *Id.* at 295.

Finally, the Fourth Circuit catalogued the "practical difficulties" that could arise if a relator were permitted to invoke Section 3731(b)(2) in the absence of government intervention. *Sanders*, 546 F.3d at 295. For example, because Section 3731(b)(2)'s limitations period is triggered when an "official of the United States charged with responsibility to act" knew or should have known of the alleged fraud, the Fourth Circuit reasoned that permitting relators to rely on Section 3731(b)(2) would lead to a "bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *Id.* at 293. That reading of Section 3731(b)(2) would create serious obstacles for defendants because, "[t]o advance a statute of limitations defense, defendants would be forced to seek out and litigate the identity and knowledge of a government official not a

party to the action." *Id.* at 295. The court also highlighted the various ways in which the purposes of the False Claims Act—to "combat fraud quickly and efficiently" and to "stimulate actions by private parties"—would be undermined if relators could refrain from acting for multiple years before invoking Section 3731(b)(2) to revive otherwise-untimely claims. *Id.* (internal quotation marks omitted).

The Tenth Circuit reached the same conclusion in *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006), holding that "§ 3731(b)(2) was not intended to apply to private qui tam relators," *id.* at 725. Although the court deemed the statutory language of Section 3731(b)(2) "ambiguous," *id.* at 723, it found clarity in the fact that Congress had drawn Section 3731(b)(2) directly from 28 U.S.C. § 2416(c), which permits tolling only where a claim is filed by the government, *id.* at 725. Like the Fourth Circuit, the Tenth Circuit also emphasized that limiting Section 3731(b)(2) to cases in which the United States has intervened, or filed suit itself, would advance the False Claims Act's objective of achieving "*rapid* exposure of fraud against the public fisc." *Id.* at 725. This interpretation of Section 3731(b)(2), the Tenth Circuit explained, would avoid "evisceration of the six-year statute of limitations . . . in the vast majority of cases" because, "[i]f relators could avail themselves of the tolling provisions of § 3731(b)(2), then we are hard pressed to describe a circumstance where the six year statute of limitations in § 3731(b)(1) would be applicable." *Id.* at 726. The court further reasoned that permitting relators to rely on Section 3731(b)(2) where the government has not intervened would "run afoul

of the absurdity doctrine" because Congress "could not have intended to base a statute of limitations on the knowledge of a non-party." *Id.* (citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989)).

The Fifth Circuit has adopted the same interpretation of Section 3731(b)(2). In *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 (5th Cir. 2000) (per curiam) (unpublished), the court concluded that, because Section 3731(b)(2) was passed to "protect[ ] the government from fraud that is not immediately discoverable" and "do[es] not offer similar protection to relators," it is "only available to relators if they are in direct identity with the government." *Id.* at *1. The court explained that, under Fifth Circuit precedent, a relator has an "independent and controlling role in initiating and prosecuting" a False Claims Act suit and thus is "not sufficiently aligned with the United States" to be able to invoke Section 3731(b)(2). *Id.*

B. The Third and Ninth Circuits have adopted a starkly different approach to Section 3731(b)(2). Those two courts have held that a relator may rely on the statute of limitations in Section 3731(b)(2) even where the United States does not intervene—a position directly at odds with that of the Fourth, Fifth, and Tenth Circuits—but that the limitations period is triggered by the *relator's* knowledge of the alleged fraud, not by the government's knowledge.

In *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), the Ninth Circuit held that Section 3731(b)(2) is "clear and unambiguous," and makes "[n]o distinction" between civil actions brought by the government and those brought by relators. *Id.*

at 1214. The Ninth Circuit reasoned that, if Congress "wanted to restrict the operation of the tolling provision to suits brought by the government, it easily could have done so. It did not." *Id.* at 1215. The Ninth Circuit found the parallels between 31 U.S.C. § 3731(b)(2) and 28 U.S.C. § 2416(c)—on which both the Fourth and Tenth Circuits relied—unpersuasive. According to the Ninth Circuit, "[t]hat Congress used the same language in both provisions proves nothing, except perhaps that when Congress did not clearly provide that the tolling provision of 31 U.S.C. § 3731(b)(2) applies only to the government, as it did for 28 U.S.C. § 2416(c), it meant for § 3731(b)(2) to apply to *qui tam* plaintiffs as well." *Id.* at 1216.

The Ninth Circuit then turned to the question of whose knowledge—the relator's or the government's—triggers the statute of limitations under Section 3731(b)(2) where the United States has not intervened in the case. The court concluded that, because "[*qui tam* relators] sue on behalf of the government as agents of the government," a relator is the person "'charged with responsibility to act' to enforce the" False Claims Act, *Hyatt*, 91 F.3d at 1217 n.8 (quoting 31 U.S.C. § 3731(b)(2)), and the relator's "duty to act" on his claim is "triggered by his own knowledge, not the knowledge of others," *id.* at 1218. If the limitations period began running "when officials within the United States government learned of the alleged fraud," the Ninth Circuit reasoned, relators could "wait a full ten years after learning of the deceit before suing," which would "frustrate the purposes of a limitations period and the purposes of the Act." *Id.*

The Third Circuit adopted the Ninth Circuit's approach in *United States ex rel. Malloy v. Telephonics*

Corp., 68 F. App'x 270 (3d Cir. 2003). The court endorsed the position that the statute of limitations in Section 3731(b)(2) was available to the relator, even though the government had not intervened in the suit, and that, in determining whether the claim was timely, it was the relator's knowledge, not the government's knowledge, that was determinative. *See id.* at 273 ("The time at which [the relator] became aware of the fraud . . . is important, because it determines whether we apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2)."). The court concluded that, because the relator had "knowledge of the alleged fraud more than three years before [the] action was filed, his only basis for asserting that his claims are timely is to proceed under the six year limitations period of § 3731(b)(1)," which the relator was likewise unable to satisfy. *Id.*

C. The Eleventh Circuit charted an entirely new course in the decision below, deepening the existing division among the circuits by adopting a third approach to interpreting Section 3731(b)(2). In direct conflict with each of the five other circuits that have addressed the issue, the Eleventh Circuit held not only that a relator may rely on Section 3731(b)(2) where the United States has not intervened in the case, but also that the limitations period is triggered by the *United States'* knowledge of the alleged fraud, not by the relator's. No other circuit follows that approach.

The Eleventh Circuit held that "the phrase 'civil action under section 3730' in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene."

Pet. App. 14a. "[N]othing in § 3731(b)(2)," the court continued, "says that its limitations period is unavailable to relators when the government declines to intervene." *Id.* In so ruling, the Eleventh Circuit "recognize[d] that [its] decision" to permit relators to rely on Section 3731(b)(2) in the absence of government intervention was "at odds with the published decisions of two other circuits," *id.* at 21a (citing *Sanders*, 546 F.3d at 293; *Sikkenga*, 472 F.3d at 726), but declared that "[t]hese cases do not persuade us" because "[t]hey reflexively applied the general rule that a limitations period is triggered by the knowledge of a party," *id.*

The Eleventh Circuit then went on to hold that "it is the knowledge of a government official, not the relator, that triggers the limitations period" in Section 3731(b)(2) because "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a. In reaching that conclusion, it expressly considered and rejected the Ninth Circuit's contrary approach in *Hyatt*, accusing that court of "creat[ing] a new legal fiction that because the relator 'sue[d] on behalf of the government,' the relator became a government agent and the government official charged with responsibility to act." *Id.* (alteration in original) (quoting *Hyatt*, 91 F.3d at 1217 n.8).

* * *

This three-way circuit split is not merely theoretical. It has serious practical ramifications for False Claims Act litigants. The Eleventh Circuit held that Hunt's complaint should not have been dismissed

as untimely because he was entitled to invoke Section 3731(b)(2) and because he alleged that "the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents," which is less than three years before he filed suit. Pet. App. 31a. If Hunt had filed his complaint in the Fourth, Fifth, or Tenth Circuits, however, he would not have been permitted to invoke Section 3731(b)(2) because the government declined to intervene, and his complaint would have been dismissed as time-barred because he indisputably filed suit after the six-year statute of limitations under Section 3731(b)(1) had expired. *Id.* at 5a–6a. And if he had filed his complaint in the Third or Ninth Circuits, his complaint likewise would have been untimely because, although he would have been entitled to rely on Section 3731(b)(2), the three-year limitations period would have begun to run when Hunt learned of the alleged fraud, between 2006 and "early 2007," rather than in 2010 when he informed the FBI of those allegations. *Id.* at 33a; *see also id.* at 34a (referring to the "undisputed allegation that [Hunt] was at least aware of, if not involved in, the fraudulent scheme as it was occurring in 2006").

These inconsistent approaches will foster forum-shopping by plaintiffs seeking the venue with the longest limitations period, uncertainty for courts grappling with three competing interpretations of the False Claims Act's statute of limitations, and unfairness for defendants subject to different limitations periods depending on the jurisdiction in which they are sued. As it has done before, the Court should grant review in this case to ensure that, no matter the jurisdiction in which a False Claims Act suit is filed, its

timeliness is evaluated under a single, nationally uniform standard. *See Graham*, 545 U.S. at 414 (granting certiorari "to resolve a disagreement among the Courts of Appeals regarding whether § 3731(b)(1)'s 6-year statute of limitations period applies to § 3730(h) retaliation actions").

II. The Eleventh Circuit's Decision Conflicts With This Court's Opinion In *Graham*.

In addition to exacerbating an existing circuit split, the Eleventh Circuit's decision conflicts with this Court's opinion in *Graham*, which established an interpretive approach to Section 3731(b) that the Eleventh Circuit failed to apply in this case.

In *Graham*, this Court held that the limitations period in Section 3731(b)(1) does not apply to False Claims Act retaliation actions brought under 31 U.S.C. § 3730(h), even though, by its terms, Section 3731(b) is applicable to any "'action under section 3730.'" 545 U.S. at 422 (quoting 31 U.S.C. § 3731(b)). Explaining that "[s]tatutory language has meaning only in context," the Court construed Section 3731(b) in the context of the broader False Claims Act and with due regard for the necessity of avoiding absurd outcomes. *Id.* at 415.

The Court began by highlighting that, whereas Section 3731(b)(1) links the start of the limitations period to "the date on which the violation of section 3729 is committed," retaliation claims under Section 3730(h) "need not allege that the defendant submitted a false claim" in violation of Section 3729, "leaving the limitations period without a starting point." *Graham*, 545 U.S. at 416. "Applying § 3731(b)(1) to

[False Claims Act] retaliation actions" thus "sits uneasily with § 3731(b)(1)'s language, which assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729' certain from which to start the time running." *Id.* (second alteration in original). That "textual anomaly," the Court reasoned, "at a minimum, shows that § 3731(b)(1) is ambiguous about whether 'action under section 3730' means all actions" or simply actions under subsections (a) and (b). *Id.*

To resolve the ambiguity, the Court relied on two interpretive guideposts. First, looking to the other provisions of the False Claims Act, it emphasized that "the very next subsection of the statute also uses the similarly unqualified phrase 'action brought under section 3730'" to refer only to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 417–18 (citation omitted). That "implicit limitation of the phrase" showed that "Congress used the term 'action under section 3730' imprecisely in § 3731" and "sometimes used the term to refer only to a subset of § 3730 actions." *Id.* at 418. Accordingly, it was "reasonable to read the same language in § 3731(b)(1) to be likewise limited." *Id.*

Second, the Court relied on the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham*, 545 U.S. at 418. Under Section 3731(b)(1), however, the "statute of limitations for [False Claims Act] retaliation actions begins to run . . . on the date the actual or suspected [False Claims Act] violation occurred," not on the date of the retaliatory conduct. *Id.* To avoid the "counterintuitive results" that would arise from

the application of Section 3731(b)(1) to retaliation claims, such as the possibility that a retaliation claim could be "time barred before it ever accrues," the Court concluded that retaliation claims should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1). *Id.* at 421.

The reasoning in *Graham* confirms that the provisions of the False Claims Act should not be construed in isolation and must be interpreted in a way that avoids absurd results, even if their plain language appears to point in a different direction. And, with respect to Section 3731(b) in particular, the Court recognized that the "civil action" language at the outset of the section may be subject to "implicit limitation[s]" depending on the statutory context and the "results" that might occur. *Graham*, 545 U.S. at 416, 418, 421.

The Eleventh Circuit ignored these interpretive principles, construing Section 3731(b)(2) in isolation from the rest of the False Claims Act and disregarding the potentially illogical outcomes that its interpretation could generate. For example, as the Tenth Circuit emphasized, permitting relators to invoke Section 3731(b)(2) in the absence of government intervention "would result in evisceration of the six-year statute of limitations in § 3731(b)(1) in the vast majority of cases." *Sikkenga*, 472 F.3d at 726; *see also, e.g.*, *Corley v. United States*, 556 U.S. 303, 314, 317 (2009) (rejecting a "literal reading" of a statute that would lead to absurd results and render other provisions within the same statute "nonsensical and superfluous"). Moreover, as the Fourth Circuit highlighted, there could be "bizarre" consequences to applying Section 3731(b)(2) where the United States has not intervened, such as triggering the start of the limitations period by the

knowledge of a nonparty, which "would . . . cause innumerable headaches for both defendants and the government during discovery." *Sanders*, 546 F.3d at 293, 295; *see also, e.g.*, *Public Citizen*, 491 U.S. at 454, 463–64 (rejecting a "literalistic reading" of a statutory provision where it would lead to "odd" practical results).

This interpretation of Section 3731(b)(2) would also lead to results incompatible with Congress's purpose in enacting the False Claims Act because, as the Fourth Circuit again recognized, it would provide relators with "a strong financial incentive to allow false claims to build up over time before they filed" suit, rather than immediately initiating litigation that would bring a prompt end to the defendant's fraud. *Sanders*, 546 F.3d at 295; *see also, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201, 202 (1979) (rejecting "literal construction" of statutory provision where it was within neither the "spirit nor . . . intention" of the broader statute as a whole).

The Eleventh Circuit's hyper-literal reading of Section 3731(b)(2)—at the expense of statutory cohesion, logic, and congressional objectives—is impossible to reconcile with the mode of analysis that this Court endorsed in construing the False Claims Act's statute of limitations in *Graham*. This Court should grant review to reiterate and reinforce the interpretive principles it established in *Graham*.

III. This Case Presents An Ideal Opportunity For The Court To Resolve A Question Of Exceptional Importance To False Claims Act Litigants.

The question presented in this case has far-reaching consequences for False Claims Act litigants because it is implicated in the vast majority of False Claims Act suits. Hundreds of False Claims Act complaints are filed each year—more than 700 were filed in 2017—but the United States generally intervenes in only about 25% of *qui tam* actions, which means that in three-quarters of those cases, courts and litigants must grapple with the question whether the statute of limitations in Section 3731(b)(2) is available to the relator. Civil Division, U.S. Department of Justice, Fraud Statistics—Overview (Dec. 19, 2017), https://tinyurl.com/ybfoto57; Pet. App. 9a n.4. The financial implications of that question are staggering: the government recovered nearly $3.7 billion from False Claims Act litigation in 2017 alone. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://tinyurl.com/ycx97lf7.

The prevalence of False Claims Act litigation and the tremendous financial stakes underscore the critical importance of establishing a nationally uniform approach to the applicability of Section 3731(b)(2). Defendants should not be left to guess which of the three conflicting approaches to the False Claims Act's statute of limitations a court will decide to follow. Nor should they be subjected to potentially devastating False Claims Act liability in a suit filed in Miami or Los Angeles that would have been time-barred had it

been filed in Charlotte or Denver. Such arbitrariness is fundamentally inconsistent with the principles of predictability and closure on which statutes of limitations are premised. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

This case is an excellent vehicle for resolving this profoundly important, frequently recurring False Claims Act question. The Eleventh Circuit's published opinion squarely raises both facets of this three-way circuit split: whether a relator can invoke Section 3731(b)(2) where the government has not intervened *and*, if so, whether the statute of limitations begins to run based on the relator's knowledge, or based on the United States' knowledge, of the alleged violation. A decision from this Court will therefore provide a conclusive answer to each aspect of the circuit conflict. And a holding that Section 3731(b)(2) is unavailable where the government has not intervened, or is triggered by the knowledge of the relator (rather than the knowledge of the United States), will put an end to this litigation without the need for further proceedings below. The Court should take advantage of this valuable opportunity before this three-way circuit split fosters even more confusion, unpredictability, and unfairness.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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September 7, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. Billy Joe Hunt, *Plaintiff-Appellant*, versus COCHISE CONSULTANCY, INC., doing business as Cochise Security, THE PARSONS CORPORATION, doing business as Parsons Infrastructure & Technology, *Defendants-Appellees*.	No. 16-12836 D.C. Docket No. 5:13-cv-02168-RDP

Appeal from the United States District Court for the Northern District of Alabama

(April 11, 2018)

Before WILSON and JILL PRYOR, Circuit Judges, and BARTLE,* District Judge.

JILL PRYOR, Circuit Judge:

Relator Billy Joe Hunt filed a *qui tam* action alleging that his employer The Parsons Corporation and another entity, Cochise Consultancy, Inc., violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, by

* Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

submitting to the United States false or fraudulent claims for payment. Hunt filed his action more than six years after the alleged fraud occurred but within three years of when he disclosed the fraud to the government. In this appeal, we are called upon to decide whether Hunt's FCA claim is time barred. To answer this question, we must construe the FCA's statutory provision that requires a civil action alleging an FCA violation to be brought within the later of:

- "6 years after the date on which the violation . . . is committed," 31 U.S.C. § 3731(b)(1), or
- "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

The question we answer today, which is one of first impression, is whether § 3731(b)(2)'s three year limitations period applies to a relator's FCA claim when the United States declines to intervene in the *qui tam* action.

The district court concluded that the limitations period in § 3731(b)(2) is inapplicable in such cases and thus Hunt's claim is time barred. After careful consideration of the statutory scheme, we hold that § 3731(b)(2)'s three year limitations period applies to an FCA claim brought by a relator even when the United States declines to intervene. Further, because the FCA provides that this period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations

purposes. Here, it is not apparent from the face of Hunt's complaint that his claim is untimely because his allegations show that he filed suit within three years of the date when he disclosed facts material to the right of action to United States officials and within ten years of when the fraud occurred. The district court therefore erred in dismissing his complaint. We reverse and remand to the district court for further proceedings.

I. FACTUAL BACKGROUND

A. The Fraudulent Scheme

Hunt alleges that Parsons and Cochise (the "contractors") defrauded the United States Department of Defense for work they performed as defense contractors in Iraq.[1] The Department of Defense awarded Parsons a $60 million contract to clean up excess munitions in Iraq left behind by retreating or defeated enemy forces. Hunt worked for Parsons in Iraq on the munitions clearing contract, managing the project's day-to-day operations. One facet of the contract required Parsons to provide adequate security to its employees, its subcontractors, and others who were working on the munitions clearing project. Parsons relied on a subcontractor to provide the security services.

After seeking bids for the security subcontract, a Parsons committee awarded it to ArmorGroup. But an Army Corps of Engineers contracting officer in Iraq

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[1] In deciding whether the district court erroneously dismissed the complaint as untimely, we accept as true the well-pleaded allegations in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). We thus recite the facts as Hunt has alleged them.

whom Cochise had bribed with trips and gifts, Wayne Shaw, was determined to override this decision and have the subcontract awarded to Cochise. Shaw directed Hunt to have Hoyt Runnels, another Parsons employee who served on the committee that selected ArmorGroup, issue a directive awarding Cochise the subcontract. When Hunt did so, Runnels refused to issue the directive, explaining that such a directive had to come from the Corps.

Shaw then created a forged directive rescinding the award to ArmorGroup and awarding the subcontract to Cochise. The directive had to be signed by Steven Hamilton, another Corps contracting officer. Hamilton, who was legally blind, relied on Shaw to describe the document he was signing. Shaw did not disclose that the directive rescinded the award to ArmorGroup so that the subcontract could be awarded to Cochise.

After Hamilton signed the directive, Shaw directed Runnels to execute it. Runnels again refused because he believed the award to Cochise had been made in violation of government regulations. Shaw threated to have Runnels fired. Two days later, Hamilton learned that the directive Shaw had him sign rescinded the award to ArmorGroup and awarded Cochise the subcontract. Hamilton immediately rescinded his directive awarding the subcontract to Cochise.

After Runnels refused to follow Shaw's directive to award the subcontract to Cochise, another Parsons employee, Dwight Hill, replaced Runnels and was given responsibility for awarding the security subcontract. Rather than give the subcontract to ArmorGroup, Hill awarded it to Cochise through a no-bid

process. Hill justified using a no-bid process by claiming there was an urgent and immediate need for convoy services and then defended the choice of Cochise to fill this immediate need by asserting that Cochise had experience that other security providers lacked. But Hunt alleges that Hill selected Cochise because he was its partner in the fraudulent scheme.

From February through September 2006, Cochise provided security services under the subcontract. Each month the United States government paid Cochise at least $1 million more than it would have paid ArmorGroup had ArmorGroup been awarded the subcontract. The government incurred other additional expenses as well. For example, armored vehicles were needed to provide the security services, and because Cochise had no such vehicles, the government paid more than $2.9 million to secure the vehicles. In contrast, ArmorGroup would have supplied its own armored vehicles, saving the government millions of dollars. In September 2006, when Shaw rotated out of Iraq, Parsons immediately reopened the subcontract for bidding and awarded it to ArmorGroup.

Several years later, Hunt reported the fraud to the United States government. On November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. During the interview, Hunt told the agents about the contractors' fraudulent scheme involving the subcontract for security services. For his role in the separate kickback scheme, Hunt was charged with federal crimes, pled guilty, and served ten months in federal prison.

B. Procedural History

After his release from prison, on November 27, 2013, Hunt filed under seal in federal district court an

FCA complaint against the contractors. Hunt set forth two theories why the claims the contractors submitted for payment qualified as false claims under the FCA. First, he alleged that Cochise fraudulently induced the government to enter into the subcontract to purchase Cochise's services by providing illegal gifts to Shaw and his team. He alleged that Parsons, through Hill, conspired with Cochise and Shaw to rig the bidding process for the subcontract. Second, Hunt alleged that the contractors had a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so.

After the United States declined to intervene, Hunt's complaint was unsealed. The contractors moved to dismiss, arguing that the claim was time barred under the six year limitations period in 31 U.S.C. § 3731(b)(1), and Hunt had waited more than seven years after the fraud occurred to file suit. Hunt responded that his claim was timely under the limitations period in § 3731(b)(2) because he had filed suit within three years of when the government learned of the fraud at his FBI interview and ten years of when the fraud occurred. The district court disagreed, concluding that § 3731(b)(2)'s limitations period was either (1) unavailable to Hunt because the United States had declined to intervene or (2) expired because it began to run when Hunt learned of the fraud. The district court then granted the motions to dismiss, finding Hunt's claim untimely under § 3731(b)(1)'s limitation period because it was apparent from the face of Hunt's complaint that he failed to file suit within six years of when the fraud occurred. This is Hunt's appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). A dismissal for failure to state a claim on statute of limitations grounds is appropriate "only if it is apparent from the face of the complaint that the claim is time-barred." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal quotation marks omitted). "We review the district court's interpretation and application of statutes of limitations *de novo*." *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006).

III. BACKGROUND ON THE FCA

Before addressing whether Hunt's claim is timely, we pause to provide some necessary background information about the roles of the government and the private plaintiff in a *qui tam* suit and to discuss the relevant FCA provisions. The FCA was enacted in 1863 to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). These contractors billed the United States "for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Id.* (internal quotation marks omitted). In response, Congress passed the original FCA, which imposed civil and criminal liability for fraud on the government, subjecting violators to double damages, forfeiture, and imprisonment. *Id.*

Since 1863, Congress repeatedly has amended the FCA. Today, the FCA continues to prohibit making

false claims for payment to the United States. *See* 31 U.S.C. § 3729(a). But unlike the original FCA that provided for both civil and criminal liability, violators today face only civil liability, which subjects them to treble damages and civil penalties.[2] *Id.*

Section 3730 of the FCA sets forth three different enforcement mechanisms for a violation of the Act. Section 3730(a) provides that the Attorney General may sue a violator in a civil lawsuit. Section 3730(b) allows a private plaintiff, known as a relator, to bring a *qui tam* action in the name of the United States against a violator. Section 3730(h) creates a private right of action for an individual whose employer retaliated against him for assisting an FCA investigation or proceeding.

This appeal concerns the second mechanism, a *qui tam* action brought by a relator under § 3730(b). In a *qui tam* action, the relator "pursues the government's claim against the defendant, and asserts the injury in fact suffered by the government." *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008).[3] In bringing a *qui tam* action, the relator "in effect, su[es] as a partial assignee of the United States." *Vt. Agency of Nat. Res.*

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[2] The FCA imposes a civil penalty of up to $11,000 for each violation occurring on or before November 2, 2015 and up to $21,563 for each violation occurring after that date. *See* 31 U.S.C. § 3729(a); 28 C.F.R. §§ 85.3(a)(9), 85.5.

[3] The FCA is one of only a handful of federal laws still in effect that may be enforced through a *qui tam* action. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) (identifying four federal statutes that authorize *qui tam* actions).

v. United States ex rel. Stevens, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted).

Special procedures apply when a relator brings an FCA action; these procedures afford the government the opportunity to intervene and assume primary control over the litigation. A relator who initiates an FCA action must file her complaint under seal and serve it only on the United States. 31 U.S.C. § 3730(b)(2). While the lawsuit remains under seal, the United States has the opportunity to investigate and decide whether to intervene as a party.[4] *Id.* During this period, the United States may serve a civil investigative demand upon any person believed to be in possession of documents or information relevant to an investigation of false claims, requiring that person to produce documents, answer interrogatories, or give oral testimony. *Id.* § 3733(a)(1). In addition, the United States may meet with the relator and her attorney, giving the government an opportunity to ask questions to assess the strengths and weaknesses of the case and the relator a chance to assist the government's investigation.[5]

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[4] The United States intervenes in approximately 25 percent of FCA *qui tam* actions. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1719 (2013).

[5] Relators often provide such assistance while the government is deciding whether to intervene. *See, e.g., United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 86-87 (D.D.C. 2012) (explaining that the relator worked closely with the government while the case was under seal by identifying potential witnesses, proposing categories of documents to be subpoenaed, and making presentations about the merits of the case);

If the United States decides to intervene, the government acquires "primary responsibility for prosecuting the action," although the relator remains a party. *Id.* § 3730(c)(1). In contrast, if the United States declines to intervene, the relator may proceed with the action alone on behalf of the government, but the United States is not a party to the action. *Id.* § 3730(c)(3).

Although the United States is not a party to a non-intervened case, it nevertheless retains a significant role in the litigation. The government may request to be served with copies of all pleadings and deposition transcripts, seek to stay discovery if it "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," and veto a relator's decision to voluntarily dismiss the action. *Id.* § 3730(b)(1), (c)(3), (c)(4). Additionally, the court may permit the government to intervene later "upon a showing of good cause." *Id.* § 3730(c)(3).

United States ex rel. Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011) (discussing actions taken by the relator while the case was under seal including meeting with government lawyers, reviewing documents for the government, and maintaining a database of subpoenaed documents); *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1326 (M.D. Fla. 2001) (explaining that while the complaint was under seal the relator was interviewed by the government multiple times, identified categories of documents for the government to subpoena, and reviewed subpoenaed documents for the government); *see also* Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. Rev. 837, 843 (2007) (summarizing the types of support a relator's counsel may give to the government while a complaint is under seal).

Any recovery obtained from a defendant in an FCA *qui tam* action belongs to the United States, regardless of whether the government has intervened. The relator is entitled to a portion of the recovery, however. *Id.* § 3730(d). Because the relator receives a share of the government's proceeds, he "is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer's contingent fee." *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *see Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (explaining that a relator sues in the name of the government "with the hope of sharing in any recovery"). By allowing a relator to bring a *qui tam* action and share in the government's recovery, the FCA creates an economic incentive to encourage "citizens to come forward with knowledge of frauds against the government." *Milam*, 961 F.2d at 49.

The size of the relator's share depends upon whether the United States intervenes. In an intervened case, the relator usually is entitled to between 15 and 25 percent of the proceeds, as well as reasonable expenses, attorney's fees, and costs. 31 U.S.C. § 3730(d)(1). In a non-intervened case, the relator's share usually is greater: between 25 and 30 percent of the proceeds, as well as reasonable expenses, attorney's fees, and costs. *Id.* § 3730(d)(2).

Even though the relator receives a smaller share in an intervened case, relators generally try to persuade the United States to intervene because the government's intervention makes it far more likely that there will be a recovery. When the United States elects to intervene, about 90 percent of the time the case generates a recovery, either through settlement or a final judgment. But only about 10 percent of non-

intervened cases result in recovery.[6] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013). Indeed, when the government declines to intervene, more than 50 percent of the time the relator decides not to proceed and voluntarily dismisses the action. *See id.* at 1717-18.

IV. ANALYSIS

With this general background in mind, we now turn to the issue in this case: whether it is apparent from the face of Hunt's complaint that his FCA claim is time barred. To answer this question, we must interpret the FCA's statute of limitations provision, which creates two limitations periods that potentially apply:

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[6] To be clear, we do not take the dramatically different success rates for intervened cases and non-intervened cases to mean that if the government declines to intervene, the case necessarily is meritless. The government may decline to intervene based on its evaluation of factors other than the merits of the claim, such as the likely size of the recovery, available agency resources, or whether the relator and his counsel have resources to prosecute the action on their own. *See* Engstrom, *supra*, at 1714. Conversely, the fact that most intervened cases generate a recovery does not necessarily mean that every intervened case has merit. The involvement of the Department of Justice in an intervened case may create a strong incentive for a defendant to settle an FCA claim regardless of its relative merit to avoid things like increased publicity of the fraud because the defendant cannot cast the litigation solely as the product of an overzealous relator; the disadvantages of litigating against the government with its considerable resources and ability to coordinate with officials at the affected agency; or the risk that the defendant may be barred from federal contracting, a sanction that is unavailable in non-intervened cases. *Id.* at 1713.

> (b) A civil action under section 3730 may not be brought—
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> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). Because it *is* apparent from the face of Hunt's complaint that he failed to file his action within the six year limitations period of § 3731(b)(1), this case turns on whether Hunt can avail himself of § 3731(b)(2). To determine whether § 3731(b)(2) applies, we must address whether its limitations period is available when the United States declines to intervene and, if so, whether the limitations period is triggered when the relator knew or should have known facts material to his claim.

A. Section 3731(b)(2) Applies When the United States Declines to Intervene.

The primary question before us is whether Congress intended to allow relators in non-intervened cases to rely on § 3731(b)(2)'s limitations period. We must begin "where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). In considering the text, we bear in mind that "[a] provision that may

seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted). We look to "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). As part of this inquiry, we also consider the canons of statutory construction. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001). Legislative history may prove helpful when the statutory language remains ambiguous after considering "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

We conclude that the phrase "civil action under section 3730" in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene. Section § 3731(b) begins by providing that its limitations periods apply to "[a] civil action under section 3730." 31 U.S.C. § 3731(b). A non-intervened cases is a type of civil action under § 3730. *See id.* § 3730(b)(1) (permitting any person to bring a civil action alleging a violation of § 3729); *id.* § 3730(c)(3) (allowing a relator to continue to conduct a *qui tam* action after the United States declines to intervene). And nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene. In the absence of such language, we conclude that the text supports allowing relators in non-intervened cases to rely on § 3731(b)(2)'s limitations period.

To ascertain its meaning, we must, of course, view § 3731(b)(2) in the broader statutory context. Looking to the statutory context, the Supreme Court has recognized that the phrase "[a] civil action under section 3730" did not refer to *all* types of § 3730 civil actions because it excluded retaliation actions brought under § 3730(h). *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005).[7] In *Graham County*, the Supreme Court considered whether § 3731(b)(1)'s six year limitations period—which begins to run when the defendant submits a false claim—applied to an employee's § 3730(h) retaliation claim alleging that her employer forced her to resign after she assisted federal officials investigating her employer for submitting false claims to the United States. *Id.* at 413-14. On its face, § 3731(b) appeared to apply to § 3730(h) retaliation actions, which were a type of civil action under § 3730. *Id.* at 415. Relying on statutory context, the Court nonetheless concluded that § 3731(b)'s literal text was ambiguous as to whether the phrase "[a] civil action under section 3730" included § 3730(h) retaliation actions. *Id.* at

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[7] Section 3730(h) creates a cause of action for an employee, contractor, or agent who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and condition of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). Although the FCA now expressly provides a three year statute of limitations for retaliation claims, *id.* § 3730(h)(3), this provision was added after the Supreme Court decided *Graham County*. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(c), 124 Stat. 1376, 2079 (2010).

417. The Court observed that § 3731(b)(1)'s limitations period was triggered by the defendant's submission of a false claim. *Id.* at 415. But a plaintiff bringing a retaliation claim under § 3730(h) did not need to allege or prove that the defendant actually submitted a false claim because an employer can be liable for retaliating against an employee who assists with an investigation or civil action even if the employer is innocent. *Id.* at 416. This tension in applying § 3731(b)(1)'s limitation period to retaliation actions led the Court to find the statute ambiguous as to whether "action under section 3730" referred to "all actions under § 3730, or only §§ 3730(a) and (b) actions." *Id.*

The Supreme Court resolved this ambiguity by concluding that § 3731(b)(1)'s limitations period did not apply to retaliation claims under § 3730(h). The Court recognized that Congress generally drafted statutes of limitations to begin to run when a cause of action accrues. *Id.* at 418. Applying § 3731(b)(1)'s limitations period to an FCA retaliation action would violate this general rule because the limitations period would begin to run when the employer committed the actual or suspected FCA violation, not when it retaliated against the employee. This interpretation could lead to the odd result that a plaintiff's retaliation claim was time barred before the employer took any retaliatory action. *Id.* at 420-21. To "avoid[] these counterintuitive results," the Court construed "civil action under section 3730" to "mean[] only those civil actions under § 3730 that have as an element a violation of section 3729, that is, §§3730(a) and (b) actions."

Id. at 421-22 (internal quotation marks omitted).[8] *Graham County* thus made clear that to determine whether § 3731(b)(2) includes *qui tam* actions where the United States declines to intervene, we must consider the text of § 3731(b)(2) in the relevant statutory context. But nothing in *Graham County* directly addressed whether the statutory context shows that § 3731(b)(2)'s limitations period is available only when the government is a party.

Here, the contractors raise several arguments contending that the statutory context and the canons of statutory construction show that Congress intended for § 3731(b)(2) to be unavailable to relators in non-intervened cases. They claim that allowing a relator

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[8] The Court also considered that Congress used the phrase "action under section 3730" imprecisely throughout § 3731 "to refer only to a subset of § 3730 actions." *Graham Cty.*, 545 U.S. at 417-18. In § 3731(d), Congress used similar language to provide that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. § 3731(d). Despite the broad reference to civil actions under § 3730, the Court explained that Congress intended for this provision to apply only to § 3730(a) actions brought by the United States or § 3730(b) actions when the United States intervened because Congress could not have intended for the United States to bear the burden of proof when it was not participating in the action. *Graham Cty.*, 545 U.S. at 417-18.

Acknowledging that imprecision permeates § 3731, the Court in *Graham County* accepted that the similar language in § 3731(b) and § 3731(d) referred to different categories of § 3730 actions. That is, the phrase "[a] civil action under section 3730" as used in § 3731(b) referred to any civil action that has an element a violation of § 3729, including non-intervened actions brought under § 3730(b), while the phrase "action brought under section 3730" as used in § 3731(d) referred only to those civil actions where the United States was a party. *Id.* at 421-22.

in a non-intervened action to rely on a limitations period that is triggered by a government official's knowledge would lead to absurd results and render a portion of § 3731(b) superfluous. We reject each of these arguments. The text of § 3731(b)(2), when viewed in context, shows that § 3731(b)(2) is available to relators when the government declines to intervene. But even if we were to conclude that § 3731(b)(2) is ambiguous making it appropriate to consider legislative history, as the contractors urge us to do, we still would conclude that § 3731(b)(2) is available to relators when the government declines to intervene.

1. We Reject that Allowing a Relator in a Non-Intervened Case to Rely on § 3731(b)(2)'s Limitations Period Is Absurd.

The contractors' primary argument is that the statutory context shows that § 3731(b)(2) is available only when the United States is a party to the case because the limitations period is triggered by a federal official's knowledge. They argue that Congress must have intended such a limitations period to be available only when the government is a party to the case because to apply a limitations period triggered by a federal official's knowledge when the United States is not a party would create a "bizarre scenario." Parsons' Br. at 12 (quoting *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008)). Put differently, they argue that reading § 3731(b)(2) to apply to non-intervened actions would lead to an absurd result. Of course, we should refrain from interpreting a statute in a way that "produces a result that is not just unwise but is clearly absurd." *CBS*, 245 F.3d at 1228 (internal quotation marks

omitted). But we have cautioned that the absurdity doctrine is "rarely applied" to avoid having "clearly expressed legislative decisions . . . be subject to the policy predilections of judges." *Id.* (internal quotation marks omitted).

This case presents no such rare instance when the absurdity doctrine applies. Certainly, it is generally the case that a discovery-based limitations period begins to run when a *party*—the plaintiff—knew or should have known about the fraud or claim. *See, e.g., Merck & Co. v. Reynolds*, 559 U.S. 633, 637 (2010) (recognizing that a securities fraud claim accrued when the plaintiff knew or should have known the facts constituting the violation); *see also* Restatement (Second) of Torts § 899(e) (statute of limitations begins to run when "the injured person has knowledge or reason to know of the facts"). We cannot say that in the unique context of an FCA *qui tam* action,[9] however, it would be absurd to peg a limitations period to a federal official's knowledge unless the United States brings the action or chooses to intervene. We reject the contractors' absurdity argument because even though the United States is not a party to a non-intervened *qui tam* action, the United States remains the real party in interest and retains significant control over the case.

Even in a non-intervened case, the relator brings the suit as the partial assignee of the United States and asserts a claim based on injury suffered by the United States as the victim of the fraud. *United States ex rel. Eisenstein v. City of New York*, 556 U.S.

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[9] *See Stevens*, 529 U.S. at 768 n.1 (explaining that the FCA is one of only four statutes authorizing *qui tam* action that remain in effect).

928, 934-35 (2009). Importantly, as the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery. *See* 31 U.S.C. § 3730(d)(2). Given the government's primary interest in a non-intervened *qui tam* action, Congress carved out for it a formal role, allowing it to intervene at any time upon a showing of good cause, request service of pleadings and deposition transcripts, seek to stay discovery if it "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," and veto a relator's decision to voluntarily dismiss the action. *Id.* § 3730(b)(1), (c)(3), (c)(4). Given this unique role, we cannot say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene.

The contractors argue that allowing a relator in a non-intervened case to rely on § 3731(b)(2)'s limitations period conflicts with the Supreme Court's decision in *Eisenstein*. In *Eisenstein*, the relators in a non-intervened case filed a notice of appeal 54 days after the district court entered a final judgment dismissing their claims. 556 U.S. at 930. Although parties normally have 30 days to file a notice of appeal, the relators argued that they could avail themselves of the 60 day deadline that applies when the United States is a party to the action. *Id.* at 930-31. The Supreme Court rejected this argument and affirmed the dismissal of the appeal, holding that the United States is not a party to a *qui tam* action when it declines to intervene. *Id.* at 937. But our decision today in no way relies on the United States being a party to the non-intervened case, and nothing in *Eisenstein* addressed whether the

United States' non-party status means that the limitations period in § 3731(b)(2) is unavailable to relators in non-intervened cases.

We recognize that our decision to reject the absurdity doctrine is at odds with the published decisions of two other circuits. *See Sanders*, 546 F.3d at 293 ("Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action."); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006) ("Surely, Congress could not have intended to base a statute of limitations on the knowledge of a non-party.").

These cases do not persuade us. They reflexively applied the general rule that a limitations period is triggered by the knowledge of a party. They failed to consider the unique role that the United States plays even in a non-intervened *qui tam* case. In light of this role, we cannot say that it would be absurd or "bizarre" to peg the limitations period to the knowledge of a government official when the government declines to intervene. We disagree that Congress, by specifying that § 3731(b)(2)'s limitations period is triggered by the knowledge of a United States official, necessarily intended that this limitations period be available only in § 3730 civil actions where the United States is a party and not in non-intervened *qui tam*

actions.[10] We thus cannot say that the statutory context shows that § 3731(b)(2)'s limitations period is unavailable to relators in non-intervened *qui tam* actions.

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[10] In *Sanders*, the Fourth Circuit also asserted that allowing a relator in a non-intervened case to rely on the limitations period in § 3731(b)(2) would place an inappropriate burden on the defendant and government by expanding the litigation into the issue of government knowledge. 546 F.3d at 295. The Fourth Circuit was concerned about allowing discovery into government knowledge when the United States declined to intervene as a party. *Id.* We agree that allowing a relator to rely on § 3731(b)(2)'s limitations period means that the parties may engage in discovery about government knowledge, but we think the Fourth Circuit's concerns about the burden associated with this discovery were overstated because the court ignored that government knowledge may be relevant to the merits of the relator's FCA claim even in a non-intervened *qui tam* action.

To prevail on the merits of her FCA claim, the relator must show, among other things, that the defendant made a misstatement that was material and that the defendant "knowingly" submitted a false claim. *See* 31 U.S.C. § 3729(a)(1); *Universal Health*, 136 S. Ct. at 2003. A defendant may rely on evidence of government knowledge to negate both of these elements. Government knowledge may disprove materiality because "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Universal Health*, 136 S. Ct. at 2003. Evidence that the government knew the relevant facts at the time that the defendant submitted its claim may also show that the defendant understood its conduct to be lawful. *See Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012) ("[T]he extent and the nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the . . . FCA." (internal quotation marks omitted)); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305

2. Our Interpretation Does Not Render a Portion of § 3731(b) Superfluous.

The contractors, relying on a canon of construction, next argue that to give meaning to the entirety of § 3731(b), we must construe § 3731(b)(2) to exclude non-intervened cases. Certainly, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). But this canon does not apply when a statutory provision would remain operative under the interpretation in question in at least some situations. *See Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1304 (11th Cir. 2013).

The contractors assert that if relators have three years from the date when the government learned of the fraud to file suit under § 3731(b)(2), relators will always delay telling the government about the fraud to increase the damages in the case. Therefore, they say, the limitations period in § 3731(b)(1), which expires six years after the date when the violation occurred, will never apply, rendering the provision meaningless. We disagree. The contractors overlook that other provisions of the FCA create strong incentives to ensure that relators promptly report fraud.

A relator who waits to report a fraud risks recovering nothing or having his relator's share decreased. The relator's claim may be barred if another relator beats him to the courthouse with an FCA claim based

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F.3d 284, 289 (4th Cir. 2002) ("[T]he government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.").

on the same facts, 31 U.S.C. § 3730(b)(5), or if the allegations or transactions are publicly disclosed either in a federal hearing where the government was a party or in a news report, unless the relator was the original source of the information, *id.* § 3730(e)(4). And because § 3731(b)(2)'s limitations period begins to run when the relevant government officials learns about the fraud from any source, a relator who delays reporting the fraud to the government also runs the risk that the government will learn about the fraud from another source and thus that § 3731(b)(2)'s three year period will expire before the relator files suit. But even if there were no risk that the government could learn of the fraud from another source, a relator still would have an incentive to report fraud promptly because the court in setting the relator's share may consider whether he "substantially delayed in reporting the fraud or filing the complaint." *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 89 (D.D.C. 2012).

Looking at the FCA as a whole, we conclude that relators who can rely on the limitations period in § 3731(b)(2) will still have sufficient incentive to report fraud promptly. Because relators will continue to report fraud promptly and under § 3731(b)(2) suit must be filed within three years of the fraud being reported, there will be cases in which § 3731(b)(1)'s six year limitations period will expire later. We thus reject the contractors' argument that our reading of the FCA would render superfluous one of its provisions.

3. To the Extent that Legislative History is Relevant, It Bolsters Our Conclusion.

The contractors argue that the legislative history shows that § 3731(b)(2)'s limitations period is unavailable to a relator when the United States declines to

intervene. Assuming that the statutory language, after viewing it in light of the statutory context and the canons of construction, remains ambiguous such that a resort to legislative history is appropriate, *see United States v. Alabama*, 778 F.3d 926, 939 (11th Cir. 2015), we cannot agree that the relevant Congressional records undermine our interpretation of § 3731(b)(2).

Congress added the limitations period in § 3731(b)(2) to the FCA in 1986. False Claims Amendments Act of 1986 ("1986 FCA Amendments"), Pub. L. No. 99-562, 100 Stat. 3153 (1986). The legislative history reveals that one of the broad purposes of the 1986 FCA Amendments was to "encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24 (1986). This purpose is consistent with Congress's historical use of *qui tam* rights of action to create incentives for private individuals to help root out fraud against the government. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991). Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for "more fraud [to] be discovered, more litigation [to] be maintained, and more funds [to] flow back into the Treasury." *Milam*, 961 F.2d at 49.

The contractors argue that we should not infer Congressional intent to extend the limitations period for non-intervened cases because in the legislative history for the 1986 FCA Amendments Congress indicated that *qui tam* actions must be brought shortly after the fraud occurred. To support their position, the contractors point to the following portion of the Senate

Committee Report, which quotes from the reasoning in a Supreme Court decision:

> [The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

S. Rep. No. 99-345, at 11 (quoting *Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

The contractors argue this language shows that Congress allowed relators to bring *qui tam* actions under the FCA because relators are able to expose fraud more rapidly than the United States can discover it, from which they infer that Congress intended for a shorter limitations period to apply when the United States was not a party to the case. But nothing in this statement addresses the length of time that a relator should have to bring a *qui tam* action or whether the limitations period should depend on the government's decision to intervene. And so we fail to see how this legislative history supports the contractors' position that a shorter limitations period should apply when the government declines to intervene.

All told, there is little legislative history for § 3731(b)(2). And the few references there are do not

directly address the question before us. The contractors point to a floor statement from Senator Charles Grassley and testimony from Assistant Attorney General Richard K. Willard before a House subcommittee. But neither piece of legislative history is particularly helpful.

Senator Grassley said in a floor statement that Congress borrowed the language in § 3731(b)(2) from 28 U.S.C. § 2416, which sets forth the limitations period that generally applies to other actions brought by the United States. *See* 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). Senator Grassley's statement reflects that Congress borrowed the language "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act" from 28 U.S.C. § 2416. *See* 28 U.S.C. § 2416(c); 31 U.S.C. § 3731(b)(2). But we disagree with the inference the contractors draw from this fact: that Congress intended to make the statute of limitations in § 3731(b) available only when the United States was a party.

To understand 28 U.S.C. § 2416, we must also look to § 2415. Section 2415 establishes various limitations periods for certain categories of claims "brought by the United States or an officer or agency thereof," such as contract or tort claims. 28 U.S.C. § 2415(a), (b). Section 2416 tolls the limitations period for the United States to bring such claims when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." *Id.* § 2416(c). The duplicate language in § 2416 is not what specifies that a limitations period in § 2415 applies only when the United States is a

party. Instead, § 2415 itself dictates that the United States must be a party for its limitations period to apply. *See id.* § 2415(a), (b) (stating limitations period applies only to claims "brought by the United States or an officer or agency thereof"). There is no similar language in any FCA provision expressly restricting § 3731(b)(2)'s limitations period to actions where the United States is a party. So we cannot say that by borrowing the description of the trigger for the limitations period from § 2416 Congress evinced an intent that the United States must be a party for the limitations period in § 3731(b)(2) to apply.

Turning to the committee testimony from Assistant Attorney General Willard, he explained that the purpose of § 3731(b)(2)'s limitations period was to give "us a little more flexibility in bringing some cases that otherwise would be barred."[11] The contractors construe Willard's testimony to mean that § 3731(b)(2) was intended to give the government—but not relators—more flexibility to bring FCA claims. Certainly, Willard testified that § 3731(b)(2) would extend the time period for the Attorney General to sue under the FCA. But Willard offered nothing about the intended effect of § 3731(b)(2) on *qui tam* actions or, more specifically, whether § 3731(b)(2) was intended to apply to *qui tam* actions when the government declined to intervene. Willard's testimony does not advance the ball for the contractors. *See also Regan v. Wald*, 468 U.S. 222, 237 (1984) (discussing limited usefulness of testimony of witnesses to ascertain meaning of statu-

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[11] *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Richard K. Willard, Assistant Att'y Gen.).

tory language given the risk that relying on such colloquies "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President"). Because the legislative history does not squarely address whether Congress intended to make § 3731(b)(2)'s limitations period available to relators in non-intervened cases, we cannot agree with the contractors that the legislative history undermines our interpretation.

To wrap up, we conclude that Congress intended for § 3731(b)(2)'s limitations period to be available to relators even when the United States declines to intervene. The statutory text reflects that this limitations period applies to "[a] civil action under section 3730," and nothing in § 3731(b)(2) makes the limitations period unavailable in *qui tam* actions under § 3730 simply because the United States decides not to intervene. The contractors argue that because § 3731(b)(2)'s limitations period is triggered by government knowledge, Congress must have intended for it to apply only when the United States is a party to avoid absurd results. But in the unique context of a non-intervened *qui tam* action, we cannot say that it is absurd to apply a limitations period triggered by government knowledge. And even if the contractors are correct that we may consider legislative history, the legislative history provides no convincing support for their position.

B. The Statute of Limitations in § 3731(b)(2) Depends on the Government's Knowledge, Not the Relator's Knowledge.

Having concluded that the statute of limitations in § 3731(b)(2) is available to a relator in a non-inter-

vened case, we must now address whether that limitations period is triggered by the knowledge of a government official or of the relator. We hold that it is the knowledge of a government official, not the relator, that triggers the limitations period.

Section 3731(b)(2) is clear that the time period begins to run when "the official of the United States charged with responsibility to act in the circumstances" knew or reasonably should have known the material facts about the fraud. 31 U.S.C. § 3731(b)(2). Nothing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge. Given that the language is plain, we cannot rewrite the statute to say that the limitations period is triggered when the *relator* knew or should have known about the facts material to the fraud.

The Ninth Circuit nonetheless adopted such an approach, concluding that the statute of limitations is triggered by the relator's knowledge. *See United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996). The Ninth Circuit created a new legal fiction that because the relator "sue[d] on behalf of the government," the relator became a government agent and the government official charged with responsibility to act. *Id.* at 1217 n.8. Again, we find nothing in the text of § 3731(b)(2) or the statutory context to support this legal fiction. Because the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run, we must reject the Ninth Circuit's interpretation as inconsistent with that text.

Applying our conclusions that § 3731(b)(2) applies in non-intervened cases and is triggered by the

knowledge of a government official, not of the relator, we hold that it is not apparent from the face of Hunt's complaint that his FCA claim is untimely. Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure.[12] The district court therefore erred in dismissing his complaint on statute of limitations grounds.

V. CONCLUSION

For the reasons set forth above, we reverse the district court's order dismissing Hunt's FCA claim as time barred and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[12] To be clear, if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt's claims could still be barred by the statute of limitations. We hold only that at the motion to dismiss stage it was error to dismiss the complaint on statute of limitations grounds.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

UNITED STATES OF AMERICA, ex *rel.* BILLY JOE HUNT,	)	Case No.: 5:13-cv-02168-RDP
Plaintiffs,	)	
v.	)	
COCHISE CONSULTANCY, INC., d/b/a COCHISE SECURITY,	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on (1) Defendant Cochise Consultancy, Inc.'s Motion to Dismiss (Doc. # 35), and (2) Defendant The Parsons Corporation's Motion to Dismiss (Doc. # 50). In their Motions, Defendants have moved to dismiss Billy Joe Hunt's ("Relator Hunt") Complaint under the statute of limitations applicable to the federal False Claims Act found at 31

U.S.C. § 3731(b).[1] The Motions have been fully briefed. (Docs. # 48, 49, 51, 59 and 60).[2]

I. Background

Relator Hunt's Complaint alleges that Parsons and Cochise fraudulently agreed for a government subcontract to be awarded to Cochise on February 21, 2006. The Complaint alleges that, as a result of that fraudulent scheme, Parsons and Cochise caused the United States Government to pay false claims between February 2006 and September 2006. The Complaint further alleges that Parsons and Cochise continued the same fraudulent conduct to continue receiving subcontracts until early 2007. (Doc. # 1).

II. The Applicable Statute of Limitations

The FCA provides that:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more

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[1] Defendants also move to dismiss on the basis that, they argue, Relator Hunt has failed to allege his claims with sufficient particularity. Relator Hunt is correct that dismissal on this basis would be inappropriate without allowing him an opportunity to replead. (Doc. # 59 at 2).

[2] On January 29, 2015, the United States notified the court of its election to decline intervention. (Doc. # 9).

than 10 years after the date on which the violation is committed,

whichever occurs last.

31 U.S.C. § 3731(b).

Relator Hunt's Complaint was filed on November 27, 2013, over six years after the occurrence of the conduct that Relator Hunt claims is fraudulent. (Doc. # 1). Defendants have moved to dismiss Relator Hunt's Complaint as barred by the applicable statute of limitations found at 31 U.S.C. § 3731(b). Relator Hunt concedes that his Complaint is barred under the six-year statute of limitations found in § 3731(b)(1),[3] but argues that the Complaint should still be deemed viable under the alternative three-year statute of limitations provided for in section 3731(b)(2). (Docs. # 48 and 59).

Relator Hunt's Response to Cochise's Motion makes clear that he first notified officials of the United States of the fraud allegations discussed in his Complaint on November 30, 2010. (Doc. # 48 at 3). However, his Response to both Motions avoids discussing in any detail the undisputed allegation that he was at least aware of, if not involved in, the fraudulent scheme as it was occurring in 2006. (Doc. # 48-1 at 25). Indeed, he reported as much to the Federal Bureau of Investigations on or about November 30, 2010. ("On February 14, 2006, Hunt was called into Army Corps of Engineers Program Manager Wayne

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[3] He further concedes that Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, does not operate to toll statutes for civil actions such as those under the FCA. *Kellog Brown & Root Servs., Inc. v. Carter*, 135 S. Ct. 1970, 1975-78 (2015).

Shaw's (Shaw) office. Shaw told Hunt to make sure the security contract was awarded to Cochise or Hunt could get out of Kuwait.")[4] (Doc. # 48-1 at 25).

Defendants' statute of limitations arguments require this court to interpret the relevant limitations provisions of the FCA. Federal courts have three differing interpretations of the FCA's statute of limitations. The first interpretation holds that section 3731(b)(2) simply does not apply to relators. *See, e.g., U.S. ex rel. Griffith v. Conn*, 117 F. Supp. 3d 961, 985 (E.D. Ky. 2015); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp. 2d 674, 693-94 (E.D. Pa. 2009). The second provides that section 3731(b)(2) applies to qui tam relators/plaintiffs, but the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action. *See, e.g., U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996). And, under the third interpretation, relators are entitled to the ten-year outer limit of section 3731(b)(2), and the tolling clock does not begin to run until the government knew or should know about the right of action. *See, e.g., U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 274 (D. Mass. 2009).

The Eleventh Circuit has not weighed in on whether a Relator is entitled to take advantage of the

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[4] In another matter around this same time, Hunt reported to the FBI that he "received approximately $300,000 in kickbacks" from another contractor. (Doc. # 48-1 at 15). On or about May 8, 2012, Relator Hunt pleaded guilty to one violation of 18 U.S.C. § 371 (Conspiracy to Commit Wire Fraud, Mail Fraud and to Engage in Unlawful Kickbacks) and one violation of 26 U.S.C. § 7206(1) (Filing a False Tax Return). (Case No. 5:11-cr-00382-AKK-TMP, Docs. # 13, 21).

FCA's three-year statutory tolling provision in a published decision.[5] But other Circuits have addressed the issue. In a case involving the FCA's statute of limitations, the Third Circuit in *U.S. ex rel. Malloy v. Telephonics Corp.*, stated (in dicta) that the point in time when the relator became aware of the defendant's alleged fraud "is important, because it determines whether we apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2)." 68 Fed.App'x. 270, 273 (3d Cir. 2003). After *Malloy*, the Supreme Court considered an issue in the FCA context involving different appellate filing deadlines when the government is a "party" versus when the government is not involved. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009). The Court found that the United States is not a party to a privately initiated FCA suit when it declines to intervene, and that private relators are therefore not entitled to a longer appellate filing deadline. *Eisenstein*, 556 U.S. at 937. District courts in the Third Circuit have applied *Eisenstein's* reasoning to the FCA's statute of limitations provision and found that section 3731(b)(2) does not apply when the United States has declined to intervene. *See, e.g., U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 693-94 (E.D. Pa. 2009) (analyzing *Malloy* and *Eisenstein* to conclude that a private relator cannot "take advantage of a tolling provision applicable only to the government").

There is a split among the Circuit courts which have decided that particular issue. *Compare U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288,

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[5] *But see Foster v. Savannah Commc'n*, 140 Fed.App'x. 905, 907 (11th Cir. 2005) (applying only the six-year statute of limitations to the relator's claim without discussing § 3731(b)(2)).

293 (4th Cir. 2008) (holding that the statute of limitations in section 3731(b)(2) only applies in cases where the United States is a party); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (same); *U.S. ex rel Erskine v. Baker*, 213 F.3d 638 (5th Cir. 2000) (unpublished table opinion) (same) *with U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) ("[W]e conclude that Congress did not intend to restrict the tolling provisions of the Act to apply to suits brought by the Attorney General alone, but intended the tolling provision to apply to qui tam plaintiffs as well.").

For obvious reasons, Relator Hunt argues, as he must, that the third interpretation should prevail here. Under the first interpretation, Relator Hunt is right out. And if this court adopted the second interpretation -- that relators are entitled to take advantage of the longer limitations period provided under section 3731(b)(2), but that the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action -- his claim would be time-barred. According to his own Complaint, Relator Hunt had knowledge of the alleged fraudulent scheme more than six years before his Complaint was filed.

In hanging his hat on the third interpretation of section 3731(b)(2), Relator Hunt argues that the three-year statute of limitations begins to run when the requisite government official knew (or should have known) of the FCA violation. He contends this analysis should apply regardless of (1) when the violation occurred and (2) his (*i.e.*, the relator's) knowledge, so long as the complaint is ultimately filed within ten years of the violation. Notably, however, no Circuit has accepted this tortured interpretation of

section 3731(b)(2). After all, it would extend the limitations period in qui tam actions regardless of how long the relator has known of the material facts. To be sure, at least one court has held that such a rule is indefensible:

> A statute of limitations that allows the allegedly bound party to extend that period at its whim creates another bizarre result. In every case in which the government's knowledge comes from the relator, the relator would have an extra three years, up to ten years after the violation, to file suit. Thus, the relator could always wait until year seven to alert the government (assuming the government's knowledge comes only from the relator) and then file suit in year ten. As the Fourth Circuit explained, such a resolution would render the six-year limitations period "superfluous in nearly all FCA cases"—violating the "duty to give effect, if possible, to every clause and word of a statute." [*United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)] (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001)).

Griffith, 117 F. Supp. 3d at 986; *see also Hyatt*, 91 F.3d at 1218 ("Hyatt cannot have it both ways. If he accepts the benefits of the tolling statute, he must be subject to its restrictions. His duty to act must be triggered by his own knowledge, not the knowledge of others. This interpretation comports with the legislative scheme of the Act, the purposes of statutes of limitations and the FCA tolling provisions.").

This court finds this reasoning persuasive and for similar reasons rejects Relator Hunt's proposal that

this court adopt the third interpretation of section 3731(b). The court need not decide which of the other two interpretations applies[6] here because Relator Hunt's claim is barred under either interpretation.

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[6] The court also finds the reasoning of those courts which have held that the plain text of the FCA supports limiting section 3731(b)(2) to cases in which the government has intervened to be well-founded. *See United States v. Cephalon, Inc.*, 2016 WL 398014, at *6 (E.D. Pa. Feb. 2, 2016); *United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 36, 53 (D. D.C. 2015) ("the Court will follow the majority view that the tolling provision of 31 U.S.C. § 3731(b)(2) does not apply to qui tam relators."); *United States ex rel. Silver v. Omnicare*, 2014 WL 4827410, at *8 (D. N.J. Sept. 29, 2014) ("A plain reading of the statute compels the conclusion that a FCA claim must be filed within six years, or if the U.S. government intervenes, the limitations period is extended for three years"); *United States ex rel. Simpson v. Bayer Corp.*, 2014 WL 1418293, at *12 (D. N.J. April 11, 2014) (applying only the six year limitation period to qui tam action); *United States ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 694–95 (E.D. Pa. 2009) ("we conclude that the three-year tolling period in § 3731(b)(2) does not apply in cases where the government does not intervene."). These cases have followed the logic of the Supreme Court in *Eisenstein*, which held that, for the purposes of Federal Rule of Appellate Procedure 4, the United States is not a party to a qui tam FCA action unless it chooses to intervene. *Eisenstein*, 556 U.S. at 937.

III. Conclusion

For the foregoing reasons, the court holds that Relator Hunt's claims are barred by the FCA's statute of limitations. 31 U.S.C. § 3731(b).

A separate order will be entered.

DONE and **ORDERED** this April 28, 2016.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C

False Claims Act

31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person

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[1] So in original. Probably should be "101–410".

did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to

be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the

complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court

determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclu-

sion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

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[1] So in original. Probably should be "General".

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Govern-

ment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or

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[1] So in original. Probably should be preceded by "section".

attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

31 U.S.C. § 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy

was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act[1] investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

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[1] So in original. Probably should be "law".

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such stand-

ards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial juris-diction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person

that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by

registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material

available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States

within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may

be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any

false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for ex-amination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that

person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such mate-

rial, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such

product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by

the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or

admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act establishes two distinct, alternative statute of limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible government official's knowledge of the alleged false claim.

PARTIES TO THE PROCEEDING & RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Respondent Billy Joe Hunt is an individual without any corporate status.

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OPINIONS BELOW

The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing the petition for a writ of certiorari until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the

violation is committed, whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

STATEMENT

The Eleventh Circuit's decision below created an explicit three-way split among the six circuits that have addressed how 31 U.S.C. § 3731(b)(2) of the False Claims Act ought to be construed. Congress enacted Section 3731(b)(2) in 1986 as an alternative to the Act's then-existing six-year statute of limitations.

The 1986 amendment created two distinct limitations periods for the False Claims Act: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

In the 32 years since Congress added Section 3731(b)(2), the federal courts have interpreted the provision in three competing ways. The Eleventh Circuit's opinion discussed all three views. Some circuits limit Section 3731(b)(2) to False Claims Act suits filed by the government or in which the government has intervened. Pet. App. 21a (citing and rejecting decisions of the Fourth and Tenth Circuits

as impermissible reformulations of the statute's plain meaning). Another construction holds that where the United States declines to intervene, the relator is the relevant "official of the United States" whose knowledge triggers the statute of limitations in Section 3731(b)(2). *Id.* at 30a ("reject[ing] the Ninth Circuit's interpretation" as a "legal fiction" "inconsistent with th[e] text" of the statute). *Id.*

The Eleventh Circuit chose neither of these interpretations, opting instead to construe Section 3731(b)(2) literally, according to its express statutory language. *Id.* at 14a, 29a-30a (holding that the statute's construction is controlled by its plain meaning); *see also* Pet. 22-23 (describing Eleventh Circuit's mode of statutory construction as "literal"). The Eleventh Circuit held that a False Claims Act relator can invoke the ten-year Section 3731(b)(2) limitations period regardless of whether the United States intervenes in the suit, so long as the relator files suit within three years of the knowledge of the relevant "official of the United States." Pet. App. 14a. The court further held that under the Act's express language, the plain meaning of "official of the United States" is not the relator initiating the *qui tam* action, but the individual employed by the federal government who is made aware of the facts underlying the suit. *Id.* at 29a-31a; *see also id.* at 54a (citing Section 3731(b)(2)).

This three-way circuit split has left False Claims Act litigants and federal trial courts in the capricious position of having the viability of such suits determined by the accident of geography and ongoing guesswork. In the Fourth, Fifth, and Tenth Circuits,

relators may invoke Section 3731(b)(2)'s ten-year limitations period only if the government intervenes. In the Third and Ninth Circuits, by contrast, a relator may rely on the ten-year limitations period regardless of the government's intervention, but with the statute's knowledge requirement based on his own knowledge, rather than the knowledge of the relevant government official. Diverging from both of these judicial reconstructions and relying on the plain statutory language, the Eleventh Circuit holds that Section 3731(b)(2) permits a relator to bring a *qui tam* action within ten years of the underlying violation, provided the suit is filed within three years of the relevant government official having knowledge of the facts material to the action. And in the six remaining circuits, would-be relators and defendants lack guidance as to which of these competing limitations periods controls their claims, which, in turn, must be surmised by the district court judges to whom their cases are assigned. This Court should grant review to establish uniformity to the False Claims Act and foreclose the judicial rewriting of the Act's clear statutory language, which rewriting undermines the mechanisms by which Congress sought to encourage the recoupment of funds defrauded from the government.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc., v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). Congress has repeatedly amended the Act, which, in its current iteration, imposes civil liability in the form of treble damages, as well as civil

penalties, on persons who make false or fraudulent claims for payment to the United States. Pet. App. 7a.; 31 U.S.C. § 3729(a).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by private persons, known as relators, who sue on the federal government's behalf, *id.* § 3730(b). In bringing a *qui tam* action, the relator, "in effect, su[es] as a partial assignee of the United States." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. While the lawsuit remains under seal, the United States has the opportunity to investigate and decide whether to intervene as a party. It may do so, and assume primary control over the litigation, or allow the relator to continue the suit alone on the government's behalf. *Id.* § 3730(b), and (c)(1) and (3). The United States owns any recovery obtained in a *qui tam* action, regardless of whether the government has intervened. Pet. App. 11a. A relator is entitled to a variable share of any recovery, depending on whether the government has intervened and the significance of the relator's contribution to the action, as well as costs and attorneys' fees. 31 U.S.C. § 3730(d)(1) and (2).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5 (Oct. 27, 1986). Before that date, the False Claims Act's limitations provision simply provided that "a civil action under section 3730

of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258 (Sept. 13, 1982). The 1986 amendment created two distinct and independent limitations deadlines: (1) "6 years after the date on which the violation of section 3729 is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

2. Petitioner, The Parsons Corporation ("Parsons"), is an engineering, construction, technical, and management firm that provided services under contracts with the United States government during the Iraq and Afghanistan wars, including a $60 million U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the cleanup of munitions left behind by retreating or defeated enemy forces. Dist. Ct. D.E. 1 (Compl.) ¶¶ 20, 46-49; Pet. App. 3a. Petitioner, Cochise Consultancy, Inc. ("Cochise"), is a security services contractor. Dist. Ct. D.E. 1 (Compl.) ¶ 21. Cochise was awarded a subcontract and task orders by Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and others working on the project. Pet. App. 3a-5a.

Respondent Billy Joe Hunt ("Hunt") is a former Parsons employee who worked in Iraq and managed the CMC contract's day-to-day operations. *Id.* at 3a.

His complaint alleges that Parsons and Cochise conspired to make false claims upon the government though a bid-rigging and bribery scheme that charged the government for security services on the CMC contract at grossly inflated rates, or for services that were not provided at all.[1] Pet. App. 3a-5a; *see also* Dist. Ct. D.E. 1 (Compl.) ¶¶ 1-9, 46-82.

As alleged in Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id.* at 3a-4a. When the Parsons employees initially refused to issue the directive, Shaw forged one, *id* at 4a, which Hunt personally observed. Dist. Ct. D.E. 1 (Compl.) ¶ 69.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Each month, the government incurred more than $1 million in additional charges to pay Cochise than if the contract had been awarded to the bid winner, ArmorGroup. The fraudulent scheme resulted in other additional charges to the government, such as approximately $2.9 million to

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[1] Relying on dicta in the district court's opinion, petitioners suggest that Hunt may have been involved in the fraudulent scheme. Pet. 19, citing Pet. App. 34a. There is no factual record at this stage of the case, and Hunt disputes any implication that he was responsible for the fraudulent scheme between Parsons and Cochise alleged in the complaint.

purchase armored vehicles for Cochise that ArmorGroup already had and would have provided under the contract at no additional cost. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id.*

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in an unrelated kickback scheme. *Id.* In that interview, Hunt told the agents about the fraudulent scheme between Cochise and Parsons relating to the munitions-clearing project. *Id.* Hunt ended up pleading guilty for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed under seal this False Claims Act suit against petitioners on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." *Id.* at 6a. The United States declined to intervene on January 29, 2015, and the complaint was unsealed. *Id.* at 33a n.2, 6a.

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. *Id.* at 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but

maintained that the action was still timely under the alternative statute of limitations in Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed the government of the alleged fraud during his 2010 FBI interview. *Id.*

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Acknowledging that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," and that the Eleventh Circuit had not yet taken a position, the district court held that the complaint was time-barred under either then-existing appellate interpretation of Section 3731(b)(2). *Id.* at 35a-40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations was either unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id.* at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed, finding the analyses of the other circuit courts to be at odds with the unambiguous statutory text, and that the statute's plain meaning is rationally related to the congressional purpose of encouraging False Claims Act suits after the government has declined to intervene. Pet. App. 13a-15a, 18a-21a. The Eleventh Circuit expressly held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened. In so doing, the court acknowledged that its conclusion was "at odds with the published decisions of two other

circuits." *Id.* at 21a (citing *United States ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the relevant federal government official's knowledge of the alleged False Claims Act violation, not by the relator's knowledge. *Id.* at 29a-31a. The Eleventh Circuit thereby explicitly "reject[ed] the Ninth Circuit's interpretation" that a relator can be the relevant "official of the United States" under Section 3731(b)(2) as a "legal fiction" "inconsistent with th[e] text" of that provision. *Id.* at 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." *Id.* at 31a.

ARGUMENT

I. THERE IS A THREE-WAY CIRCUIT SPLIT AS TO WHETHER AND WHEN FALSE CLAIMS ACT RELATORS MAY INVOKE SECTION 3731(b)(2).

Petitioners correctly summarize the three irreconcilable interpretations of Section 3731(b)(2) adopted by the courts of appeals. Pet. 11-18 (Part I.A-I.C). Three circuits hold that Section 3731(b)(2) applies only in cases filed or intervened by the United States, and that in all other cases, relators benefit only from the six-year limitations period established by Section 3731(b)(1). *See Sanders*, 546 F.3d at 293-95 (4th Cir. 2008); *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 at *1 (5th Cir. April 13, 2000) (per curiam) (unpublished opinion); *Sikkenga*, 472 F.3d at 725-26 (10th Cir. 2006). The Eleventh Circuit fully considered the *Sanders/Sikkenga* analyses, and rejected them, holding that Section 3731(b)(2)'s unambiguous statutory language applies to all relators, even in non-intervened cases. Pet. 13a-17a. Further, the court found the contention that this would lead to absurd results to unavailing, holding that Congress could have rationally desired relators to pursue False Claims Act cases even when the government did not intervene, and that the Act's other provisions would temper the potential abuses contemplated in *Sanders* and *Sikkenga*. *Id.* at 18a-24a, 29a.

In stark contrast with the Fourth, Fifth, and Tenth Circuits, two other circuits hold that Section 3731(b)(2) does apply to relators in non-intervened

cases, but that the limitations period is triggered by the *relator's* knowledge of the alleged fraud, not by the government's knowledge. *See United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x. 270, 273 (3rd Cir. 2003); *Hyatt*, 91 F.3d at 1215-18 (9th Cir. 1996). The Eleventh Circuit also reviewed and rejected the *Hyatt* analysis, holding that Section 3731(b)(2) expressly provides that "it is the knowledge of a government official, not the relator, that triggers the limitations period," because "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a. *Hyatt*'s counter-textual conclusion, the Eleventh Circuit observed, "created a new legal fiction that because the relator sue[d] on behalf of the government, the relator became a government agent and the government official charged with responsibility to act." *Id.* (internal citation and quotation omitted).

Having thoroughly examined these two disparate interpretations, the Eleventh Circuit instead chose a third course: To construe Section 3731(b)(2) by its plain statutory meaning, and without reformulating it according to judicial policy preferences. *Id.* at 14a-24a, 29a-31a. *See also Sikkenga*, 472 F.3d at 736 (Hartz, J., concurring in part, dissenting in part) (concurring with the majority that *Hyatt*'s interpretation of Section 3731(b)(2) is untenable under the plain statutory terms, but dissenting on the ground that the text was unambiguous and not the proper subject of judicial rewriting to obtain a policy result inconsistent with what Congress could plausibly have chosen).

II. THE ELEVENTH CIRCUIT'S DECISION, WHICH FOLLOWS UNAMBIGOUS STATUTORY TEXT AND UPHOLDS THE RATIONAL CONGRESSIONAL GOAL OF ENCOURAGING RELATORS TO FILE FALSE CLAIMS ACT SUITS WHEN THE GOVERNMENT DOES NOT INTERVENE, DOES NOT CONFLICT WITH THE COURT'S OPINION IN *GRAHAM*.

Positing that the Eleventh Circuit's decision creates absurd results, petitioners assert that the court's construction of Section 3731(b)(2) is textually anomalous in the larger context of the False Claims Act as a whole, thereby running afoul of this Court's teaching in *Graham County Soil & Water Conservation District v. United States ex. rel. Wilson*, 550 U.S. 409 (2005). Petitioners are mistaken: the absurdity doctrine may not be invoked merely because the plain meaning of a statute creates outcomes that are unfavorable to a party or even a class of parties; the doctrine applies only when the absurdity is "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The result countenanced by the Eleventh Circuit is not only not absurd, but entirely consistent with the congressional purpose encompassed by the False Claims Act to encourage the recoupment of stolen taxpayer funds.

The "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and that a court should "fit, if possible, all parts into a harmonious whole."

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (internal quotation marks omitted). In *Graham*, the Court held that while the False Claims Act's retaliation suit provision, 31 U.S.C. § 3730(h), facially appeared to fall within the Act's six-year limitations period for "civil actions" brought under the Act, *id.* § 3731(b), such a reading was incongruous with the statute in its entirety, and at odds with the very purpose of creating a distinct cause of action for retaliation that might actually be employed by a plaintiff. *Graham*, 545 U.S. at 413-17. Applying the Act's limitations period to the retaliation provision, with the period accruing upon the making of a false claim, would be absurd. If applied as written, the limitations period could begin before the putative plaintiff had been retaliated against, even if the plaintiff was not a relator and the retaliation occurred after the underlying false claim, and even though the government (to whom the phrase "civil action under section 3730" was directed) was not ordinarily a party to retaliation suits. *Id.* at 416-22; *see also* Pet. App. 15a-17a (Eleventh Circuit explaining *Graham*'s lack of utility in analyzing Section 3731(b)(2)).

"[N]othing in *Graham* ... directly addressed whether the statutory context shows that § 3731(b)(2)'s limitations period is available only when the government is a party." Pet. App. 17a. As the Eleventh Circuit explained, "in the unique context of an FCA *qui tam* action . . . even though the United States is not a party to a non-intervened [case], the United States remains the real party in interest and retains significant control over the case . . . . [T]he relator brings the suit as the partial assignee of the

United States, and asserts a claim based on injury suffered by the United States as the victim of the fraud." *Id.* at 19a. "[A]s the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery." *Id.* at 20a. The government maintains the "primary interest" even in a non-intervened suit, with Congress granting it the right to obtain pleadings and discovery in the litigation, to stay discovery in light of competing governmental interests, to veto a relator's decision to dismiss the action, and to intervene at any time upon a showing of good cause. *Id.* "Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for more fraud to be discovered, more litigation to be maintained, and more funds to flow back into the Treasury." Pet. App. 25a (internal citation and punctuation omitted).

Neither *Graham* nor the False Claims Act taken *in toto* remotely suggests, much less "make[s] plain the intent of Congress that the letter of [Section 3731(b)(2)] is not to prevail." *Crooks*, 282 U.S. at 60. Notwithstanding petitioners' suggestion of absurdities resulting from the Eleventh Circuit's literal construction of Section 3731(b)(2), Pet. 22-23, the statutory scheme devised by Congress accounts for the competing considerations arising under the Act. For instance, petitioners argue that permitting relators to invoke Section 3731(b)(2) absent government intervention would eviscerate the six-year limitations period of Section 3731(b)(1) "in the vast majority of cases" and give relators a financial incentive to let their claims accumulate. Pet. at 22-

23. But petitioners ignore the entirely reasonable possibility that Congress would not wish to foreclose relators from bringing *qui tam* actions that could result in dismantling frauds against the government, and thus would not want relators to be prejudiced when, after investigation, the government elects not to intervene after the six-year limitations period under Section 3731(b)(1) has expired. *See* Pet App. 12a, n.6 (Eleventh Circuit discussing many of the pragmatic factors influencing the government's decision to intervene in False Claims Act suits); *see also Sikkenga*, 472 F.3d at 736 (Hartz, J., dissenting) ("Congress could well have decided that a relator should not be time-barred if the government is not."). Petitioners also ignore "that other provisions of the FCA create strong incentives to ensure that relators promptly report fraud," lest their claims be lost or their recoveries diminished. Pet. App. 23a-24a.

Similarly overwrought is petitioner's prediction of "innumerable headaches" arising in discovery for defendants and the government if the knowledge of the "non-party" relevant government official is put at issue under Section 3731(b)(2). Pet. 22-23. In point of fact, the "non-party" government is always the real party in interest in False Claim suits, Pet. App. 19a, and the False Claims Act already puts governmental knowledge at issue under the Act's scienter and materiality requirements. *Id.* at 22a, n.10 (citations including 31 U.S.C. § 3729(a)(1)). In the fraction of False Claims Act cases that go forward after the government elects not to intervene and the six-year limitations period under Section 3731(b)(1) has expired, a simple declaration from the relevant government official should suffice in most cases to

establish the date the government learned of the fraud. *Cf. United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1287 (10th Cir. 2010) (finding relator's affidavit sufficient to establish he was "original source" of false claims allegations under 31 U.S.C. § 3730(e)(4)).

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1997). Petitioners acknowledge that the Eleventh Circuit's interpretation of Section 3731(b)(2) is the literal one. Pet. 22-23. Though petitioners might prefer to escape the False Claim Act's strictures, Congress has made the entirely reasonable choice that relators ought to be able to pursue *qui tam* actions within three years of the government failing to act on knowledge of the underlying fraud, provided that they do so within ten years of that fraud. Pet. App. 18a-22a; *accord*, *Sikkenga*, 472 F.3d at 735-36 (Hartz, J., dissenting) (the absurdity doctrine cannot apply where the outcome dictated by Section 3731(b)(2)'s plain textual meaning is a plausible congressional policy choice). Petitioners' invocation of *Graham* is a prayer for the Court to create statutory ambiguity where none exists in pursuit of a policy outcome that Congress did not choose. The Court should reject it.

III. THE COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF SECTION 3731(b)(2) TO ELIMINATE THE ONGOING CONFUSION, UNPREDICTABILITY, AND UNFAIRNESS IN THE FALSE CLAIMS ACT'S APPLICATION IN THE FEDERAL COURTS.

Hunt agrees with petitioners that the current division among the circuits in construing Section 3731(b)(2) leaves litigants in the aberrant position of having the False Claims Act's potential application determined by the accident of geography rather than a uniform standard set by Congress. *Cf. Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (discussing the need for the federal judiciary to establish uniformity in the application of federal law). It is not only defendants who are exposed to the unfairness of the current disparate interpretations; would-be relators in the Fourth, Fifth, and Tenth Circuits are precluded from filing their own *qui tam* suits if the government does not file suit before the six-year limitations period under Section 3731(b)(1) expires. In the Third and Ninth Circuits, defining the relator as the relevant government officials denies the actual government officials with primary responsibility to act on such frauds the full opportunity to investigate and determine if the government itself should bring the suit, thereby forcing—if the fraud is to be contested—potential relators to themselves bring *qui tam* actions that might otherwise be optimally brought by the government. Under either interpretation, it is the government that is ultimately disadvantaged by the

stymieing of suits that will return fraudulently obtained federal funds.

In the Eleventh Circuit, potential relators have two options: they can (1) file suit within six years of the violation regardless of what action the government is taking, per Section 3731(b)(1); or, (2) if the government investigates, but elects not to bring a False Claims suit, potential relators may take it upon themselves to protect the public fisc, provided they do so within ten years of the underlying violation and three years of the government's initial knowledge of the fraud.

In the remaining six circuits lacking definitive appellate decisions, these competing interpretations have left litigants and judges entirely at sea. Intra-circuit splits have arisen among the district courts in the D.C. Circuit, *compare, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F. Supp. 2d 75, 81-89 (D.D.C. 2007) (Lambert, J.) (presaging Eleventh Circuit's analysis here) with *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F.Supp.3d 9, 34-37 (D.D.C. 2014) (Wilkins, J.) (adopting *Sanders/Sikkenga* analysis), as well as the Seventh Circuit. *Compare, e.g., United States ex rel. Salmeron v. Enterprise Recovery Sys.*, 464 F. Supp. 2d 766, 768-70 (N.D. Ill 2006) (Shadur, J.) (rejecting *Hyatt*'s analysis) with *United States ex rel. Bidani v. Lewis*, 1999 U.S. Dist. LEXIS 3530 at *9-24 (N.D. Ill. March 12, 1999) (Hart, J.) (adopting *Hyatt*'s analysis). Further disparities exist across the district courts in the undecided circuits. *See, e.g., United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 800-03 (S.D.N.Y. 2017) (endorsing analytical framework

ultimately adopted by Eleventh Circuit here), *rev'd on other grounds*, 899 F.3d 163 (2nd Cir. 2018); *United States ex rel. Giffith v. Conn*, 117 F. Supp. 3d 961, 984-87 (E.D. Ky. 2015) (adopting *Sanders/Sikkenga* analysis); *United States ex rel. Millin v. Krause*, 2018 U.S. Dist. LEXIS 65801 at *6-20 (D.S.D. April 19, 2018) (adopting *Hyatt* analysis). The urgent need for the clarification only this Court can provide is demonstrated by the pervasive, ongoing confusion about Section 3731(b)(2)'s proper meaning and its disparate application among the federal courts.

Where, as here, the courts of appeals are in irreconcilable disagreement about the proper interpretation of a federal statute of limitations, the Court should grant review to ensure a nationally uniform limitations period. *See, e.g., Green v. Brennan*, 136 S. Ct. 1769, 1775 (2016) (granting certiorari to resolve circuit split over the proper accrual date for Title VII constructive discharge claims); *Graham*, 545 U.S. at 414 (granting certiorari to resolve circuit split over the applicable limitations period for retaliation actions under the False Claims Act); *Bay Area Laundry & Dry Cleaning Pension Trust Fund. v. Ferbar Corp.*, 522 U.S. 192, 200 (1997) (granting certiorari to resolve circuit split and establish uniform statute of limitations accrual date for unpaid withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980).

The Eleventh Circuit's opinion provides the Court the opportunity to conclusively decide whether a relator can invoke Section 3731(b)(2) where the government has not intervened, and, if so, whether

the statute of limitations begins to run based on the relator's knowledge of the alleged violation, or the United States' knowledge of the alleged violation. Respondent Hunt agrees that this case provides an appropriate vehicle by which the Court can apply the unambiguous text of Section 3731(b)(2) to ensure the uniform, nationwide application of the False Claims Act.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No. 18-315

COCHISE CONSULTANCY, INC., ET AL., PETITIONERS

v.

UNITED STATES EX REL. BILLY JOE HUNT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument in this case as amicus curiae supporting respondent and that the United States be allowed ten minutes of argument time. Respondent has consented to the allocation of ten minutes of argument time to the United States.

This case concerns a provision of the False Claims Act (FCA), 31 U.S.C. 3729 et seq., specifying the time within which a "civil action under section 3730" may be brought. 31 U.S.C. 3731(b).

The FCA contains a six-year statute of limitations. 31 U.S.C. 3731(b)(1). It also contains a tolling provision that permits a civil action under Section 3730 to be brought after the six-year limitations period, as long as the action is brought within three years after "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. 3731(b)(2). The questions presented here are (1) whether the tolling provision, 31 U.S.C. 3731(b)(2), applies to a civil action brought by a qui tam relator under Section 3730 when the United States declines to intervene in the action and (2) whether a qui tam relator is "the official of the United States charged with responsibility to act in the circumstances," 31 U.S.C. 3731(b)(2), in such an action when the United States declines to intervene.

The United States has a substantial interest in the resolution of those questions. The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. A qui tam suit under Section 3730 is a means of redressing a legal wrong done to the United States, and the United States receives the majority of any monetary recovery, whether or not the United States intervenes.

The United States has participated in oral argument as amicus curiae in prior cases involving interpretation of the FCA, e.g., State Farm Fire & Cas. Co. v. United States ex rel. Rigsby, 137 S. Ct. 436 (2016); Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016); Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, 135 S. Ct. 1970 (2015); Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401 (2011); Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280 (2010). Oral presentation of the views of the United States is therefore likely to be of material assistance to the Court.

Respectfully submitted.

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FEBRUARY 2019

No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

REPLY BRIEF FOR PETITIONERS

Respondent Billy Joe Hunt urges this Court to grant review in order to "resolve the conflicting interpretations of Section 3731(b)(2)" and "eliminate the ongoing confusion, unpredictability, and unfairness" created by that three-way circuit split. Resp. Br. 18 (capitalization altered). Hunt's plea for review eliminates any conceivable doubt that this case presents an important, recurring question of federal statutory interpretation that has divided the lower courts and that warrants resolution by this Court.

Hunt agrees with petitioners that the Eleventh Circuit's decision "created an explicit three-way split among the six circuits that have addressed how 31 U.S.C. § 3731(b)(2) of the False Claims Act ought to be construed." Resp. Br. 2; *see also id.* at 11–12. Indeed, the Eleventh Circuit itself expressly acknowledged that its decision to permit relators to rely on Section 3731(b)(2)'s statute of limitations in cases in which the United States has not intervened was "at odds with the published decisions of two other circuits," the Fourth and the Tenth. Pet. App. 21a; *see also* Pet. 15 (discussing unpublished decision from the Fifth Circuit agreeing with the Fourth and Tenth Circuits). The Eleventh Circuit then exacerbated that circuit split by holding, in direct conflict with the Third and Ninth Circuits, that Section 3731(b)(2)'s statute of limitations begins to run when the United States government, rather than the relator, becomes aware of the alleged fraud. Resp. Br. 11–12; *see also* Pet. App. 30a. All parties agree that this division in authority has serious real-world consequences. As Hunt recognizes, the circuits'

divergent positions mean that the timeliness of a False Claims Act suit may be "determined by the accident of geography rather than a uniform standard set by Congress." Resp. Br. 18; *see also* Pet. 18–19.

Not surprisingly, however, the parties disagree about the correct interpretation of Section 3731(b)(2). Hunt disputes petitioners' position that the Eleventh Circuit's decision departs from the interpretive principles this Court applied when construing Section 3731(b) in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005). In Hunt's view, the Eleventh Circuit's decision does not produce "absurd" results but is instead "entirely consistent with the congressional purpose encompassed by the False Claims Act to encourage the recoupment of stolen taxpayer funds." Resp. Br. 13; *see also id.* at 14–17. But Hunt ignores the fact that permitting relators to wait up to ten years to file suit under Section 3731(b)(2)—rather than requiring them to file suit within six years of the alleged violation under Section 3731(b)(1)—gives relators an incentive to delay filing suit in an effort to maximize recoveries, thereby undermining Congress's interest in "combat[ting] fraud quickly and efficiently." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008). And he disregards this Court's statement in *Graham* that the applicability of the limitations periods in Section 3731(b) may be subject to "implicit limitation[s]" so as to avoid such "counterintuitive results." 545 U.S. at 418, 421. In any event, there will be ample opportunity for both sides to develop these arguments more fully, if this Court grants review.

Finally, there is no dispute that this case presents an issue of exceptional importance to both plaintiffs and defendants in False Claims Act litigation. *See* Resp. Br. 18–21. Hunt emphasizes that "[i]t is not only defendants who are exposed to the unfairness of the current disparate interpretations." *Id.* at 18. And, as *amicus* U.S. Chamber of Commerce makes clear, False Claims Act actions "touch on nearly every sector of the economy," "frequently last a long time," and can be extremely costly for defendants. Br. of Chamber of Commerce 16. Given the prevalence and significance of False Claims Act litigation, there should be a nationally uniform standard for deciding whether a False Claims Act suit is timely. As all parties agree, this Court should grant review to establish that nationwide standard and to provide certainty for False Claims Act litigants.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case presents an important and frequently litigated question: whether a relator in a *qui tam* False Claims Act suit may lengthen the limitations period by invoking 31 U.S.C. § 3731(b)(2)—which runs from the date when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even though the United States has declined to intervene. The Eleventh Circuit's decision imposes significant burdens on the Chamber's members and other False Claims Act defendants. It allows relators to bring very stale suits, based on events up to a decade old, even when they knew of the alleged violation many years earlier.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice ten days prior to the due date of the Chamber's intention to file this brief. All parties have consented to the filing of the brief.

SUMMARY OF ARGUMENT

Every year, *qui tam* relators file hundreds of False Claims Act complaints. The United States intervenes in only about 25% of those cases, leaving the vast majority to be litigated by private plaintiffs. *See* Pet. App. 9a n.4; U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://www.justice.gov/opa/press-release/file/1020126/download. The question presented here—whether a relator may invoke 31 U.S.C. § 3731(b)(2) to lengthen the limitations period to as much as 10 years—is a critical threshold question in many of those hundreds of declined cases each year.

Section 3731(b) provides:

> A civil action under section 3730 may not be brought—
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> >
> > (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

As the Eleventh Circuit acknowledged, its interpretation of that statute creates a three-way split among the courts of appeals. It is undisputed that the complaint in this case was not timely filed under sub-

section 3731(b)(1)'s six-year limitations period. Thus, if the relator in this case, Mr. Hunt, had brought suit in the Fourth or Tenth Circuit, his complaint would have been time-barred. In those circuits, a *qui tam* relator may not invoke the limitations period in subsection 3731(b)(2) when the United States has declined to intervene. If, on the other hand, Mr. Hunt had filed suit in the Ninth Circuit, his suit would have been time-barred, for different reasons. In the Ninth Circuit, a relator may rely on subsection 3731(b)(2) in a declined case, but the relator is deemed to be "the official of the United States charged with responsibility to act." Because Mr. Hunt filed his complaint more than six years after the alleged violation and more than three years after he learned of facts material to his claims, his suit would have been dismissed in the Ninth Circuit.

Nonetheless, the Eleventh Circuit decided that the district court erred in dismissing Mr. Hunt's action as untimely because, in its view, a relator may rely on the limitations period in subsection 3731(b)(2), and also benefit from the government's later-in-time discovery of material facts as the starting point from which the limitations period runs. The Eleventh Circuit's decision is wrong. This Court has held that, although section 3731(b) states that it applies to "[a] civil action," that phrase should not be read to apply to all False Claims Act cases when doing so would result in "counterintuitive results." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415-422 (2005). Allowing relators to invoke subsection 3731(b)(2) in non-intervened cases leads to many of the kinds of counterintuitive results this Court warned against. The timeliness of a *relator's* suit would be determined by when the *government* learned of the basis for the relator's claims—allowing relators to de-

lay filing suit for years beyond the presumptive six-year limitations period, even when there is no good reason for doing so. The relator's limitations period could also start running even without his or her knowledge (*e.g.*, if the government received the relevant information without the relator's knowledge). In addition, the decision below renders subsection 3731(b)(1) insignificant and undermines the False Claims Act's intent to encourage the prompt filing of claims. Relators instead will have every reason to delay bringing their claims in the hope of claiming larger damages and penalties.

Finally, the Eleventh Circuit's interpretation of the False Claims Act imposes significant burdens on False Claims Act defendants. First, the three-way circuit split engenders uncertainty as the limitations period depends on the place of filing. Second, the Eleventh Circuit's decision is unfair to False Claims Act defendants, depriving them of the certainty and stability that statutes of limitations are designed to promote, and instead requiring them to defend against stale claims as much as ten years old. By prolonging False Claims Act litigation over stale claims, the court of appeals' decision increases litigation costs. Those costs, particularly when extensive discovery may be permitted, will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of the claims against them. Third, False Claims Act defendants would face difficult-to-challenge reputational harm, in addition to substantial financial risk, from old claims.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION CREATED A THREE-WAY CIRCUIT SPLIT

Before the Eleventh Circuit's decision, the courts of appeals were already divided over which statute of limitations governs a *qui tam* False Claims Act suit in which the government has declined to intervene. The Eleventh Circuit's decision added a third variant to the two positions other courts of appeals had adopted.

The Fourth and Tenth Circuits have held that a relator may not lengthen the six-year limitations period provided in 31 U.S.C. § 3731(b)(1) by invoking subsection 3731(b)(2).[2] *United States ex rel. Sanders* v. *North Am. Bus Indus., Inc.*, 546 F.3d 288, 293-296 (4th Cir. 2008); *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 722-726 (10th Cir. 2006). The Eleventh Circuit expressly disagreed with the Fourth and Tenth Circuits. Pet. App. 21a-22a; *see Sanders*, 546 F.3d at 293-294; *Sikkenga*, 472 F.3d at 723-725.

The decision below also broke with the interpretation of section 3731(b) adopted by the Ninth Circuit. Pet. App. 29a-31a; *see United States ex rel. Hyatt* v.

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[2] As petitioners note (at 15), the Fifth Circuit has adopted in unpublished decisions the same interpretation as that embraced by the Fourth and Tenth. *See United States ex rel. Jackson* v. *University of N. Tex.*, 673 F. App'x 384, 387 (5th Cir. 2016) (per curiam) ("In this circuit, however, *qui tam* FCA actions are governed by the limitations period found in § 3731(b)(1) when the government declines to intervene, as it did here."), *cert. denied*, 138 S. Ct. 59 (2017); *United States ex rel. Erskine* v. *Baker*, 2000 WL 554644, at *1 (5th Cir. Apr. 13, 2000) (per curiam) ("Because this action is not prosecuted by the United States or by its deputy, ... the Erskines cannot benefit from a tolling provision passed exclusively for the government's benefit.") (unpublished).

Northrop Corp., 91 F.3d 1211 (9th Cir. 1996). Like the Eleventh Circuit, the Ninth Circuit had determined that subsection 3731(b)(2) applies in non-intervened *qui tam* cases because, in its view, the statute makes "[n]o distinction" between a relator's suit and the government's suit. *Hyatt*, 91 F.3d at 1214, 1215 nn.5, 6. Unlike the Eleventh Circuit, however, the Ninth Circuit held that the limitations period under subsection 3731(b)(2) begins from the relator's, not the government's, knowledge. *Id.* at 1217-1218. In its view, the relator, in bringing a *qui tam* action, should be considered an "agent[] of the government" "'charged with responsibility to act' to enforce the False Claims Act" when the government declines to intervene. *Id.* at 1217 n.8, 1218 (quoting 31 U.S.C. § 3731(b)(2)).[3] The Eleventh Circuit criticized this reasoning as resting on "a new legal fiction," noting that "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a.

This division among the courts of appeals will persist, if not deepen further, because the Eleventh Circuit's decision endorses different parts of the two approaches previously adopted by other circuits. Indeed, the three-way circuit split created by the decision below in effect embodies four distinct views about how to interpret the False Claims Act's statute of limitations: (i) only subsection 3731(b)(1) applies to non-intervened suits (Fourth and Tenth Circuits); (ii) both subsections 3731(b)(1) and (b)(2) apply to non-intervened suits (Ninth and Eleventh Circuits); (iii) "the official of the

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[3] The Third Circuit has applied the same approach in an unpublished decision in *United States ex rel. Malloy* v. *Telephonics Corp.*, 68 F. App'x 270, 273 (3d Cir. 2003). *See* Pet. 16-17.

United States" in subsection 3731(b)(2) refers to the relator in non-intervened actions (Ninth Circuit); and (iv) "the official of the United States" refers to an actual government official in those actions (Fourth, Tenth, and Eleventh Circuits). None of these views has clear majority support, thus worsening the confusion for the remaining courts of appeals and district courts.[4]

This is not a case where factual differences explain the divergent outcomes; nor is it an issue as to which the passage of time could harmonize the circuits' differing views. Only this Court's intervention can bring needed uniformity in the handling of this important threshold legal question regularly litigated in many of the hundreds of False Claims Act cases filed each year.

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[4] District court judges in circuits where the court of appeals has not addressed this issue have adopted a mix of views. Some have adopted the Ninth Circuit's approach. *See, e.g.*, *United States ex rel. Huddalla* v. *Walsh Constr. Co.*, 834 F. Supp. 2d 816, 824 (N.D. Ill. 2011); *cf. United States ex rel. Millin* v. *Krause*, 2018 WL 1885672, at *6 (D.S.D. Apr. 19, 2018) (applying a modified version of the Ninth Circuit's approach). Others have adopted the Eleventh Circuit's approach. *See, e.g.*, *United States ex rel. Wood* v. *Allergan, Inc.*, 246 F. Supp. 3d 772, 801-803 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018); *United States ex rel. Ven-A-Care* v. *Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 273-274 (D. Mass. 2009); *United States ex rel. Pogue* v. *Diabetes Treatment Ctrs. of Am.*, 474 F. Supp. 2d 75, 82-89 (D.D.C. 2007). And at least one district court has decided that subsection 3731(b)(2) applies to non-intervened suits, while declining to address the "further split" regarding whether "the official of the United States" refers to a government official or a relator. *See United States ex rel. Helfer* v. *Associated Anesthesiologists of Springfield, Ltd.*, 2014 WL 4198199, at *16-17 (C.D. Ill. Aug. 25, 2014) (unpublished).

II. THE DECISION BELOW IS WRONG

The Eleventh Circuit principally reasoned that section 3731(b)'s use of the phrase "civil action under section 3730" includes all types of False Claims Act cases: government-initiated, relator-initiated in which the government joins, and relator-initiated in which the government declines to intervene. In the Eleventh Circuit's view (and the Ninth Circuit's), "nothing in § 3731(b)(2) says that its limitations period is unavailable" in such suits. Pet. App. 14a. That is not so.

A. In *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409, 415-422 (2005), this Court held that the six-year statute of limitations in subsection 3731(b)(1) does *not* apply to a retaliation claim under the False Claims Act, even though subsection 3731(b)(1) applies to "a civil action under section 3730" and retaliation claims are authorized by section 3730(h). The Court emphasized that "[s]tatutory language has meaning only in context" and the context suggested that "a civil action under section 3730" was "ambiguous, rather than clear." *Id.* at 415. The Court resolved that ambiguity by excluding retaliation claims from "a civil action under section 3730." *Id.* at 422. That decision was guided both by the statutory context and by the interpretive canons that a statute should be construed to "avoid ... counterintuitive results" and that "Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Id.* at 415-422.

The Eleventh Circuit's decision contradicts *Graham County*. It treats the phrase "a civil action under section 3730" as clear even though *Graham County* explained that "Congress used the term 'action under sec-

tion 3730' imprecisely in § 3731," 545 U.S. at 418. And the statutory context is even clearer on the question presented in this case than it was on the question presented in *Graham County*. Subsection 3731(b)(2) refers to "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). As the Eleventh Circuit acknowledged, that phrase refers to a government official. Pet. App. 14a-22a, 29a-30a. This strong textual signal makes clear that Congress did not intend subsection 3731(b)(2) to be available in *qui tam* cases in which the government declines to intervene. *See Sanders*, 546 F.3d at 293-294 ("Section 3731(b)(2) refers only to the United States—and not to relators. Thus, Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party."); *see also Sikkenga*, 472 F.3d at 725 ("[W]e hold that § 3731(b)(2) was not intended to apply to private qui tam relators at all."). Reading "a civil action under section 3730" as applying to suits in which the government has chosen not to participate would therefore create just the sort of "textual anomaly" that *Graham County* identified as supporting a more limited construction. 545 U.S. at 416.

Legislative history confirms that "a civil action under section 3730" does not have the rigid meaning embraced by the Eleventh Circuit. Subsection 3731(b)(2) was added in 1986. Prior to that, the False Claims Act's limitations provision simply stated that "a civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). In support of adding subsection 3731(b)(2), the Assistant Attorney General for the Civil Division testified to a subcommittee of the House

Judiciary Committee that he had seen "requests to sue come in right on the brink of the statute of limitations, and sometimes beyond," which precluded the government from acting on fraud that "ha[d] been concealed, as it frequently is, from the Government." *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Govt'l Relations of the H. Comm. on the Judiciary*, 99th Cong. 159 (1986) ("*House Hearings*") (statement of Assistant Attorney General Willard). The "limited tolling period," he explained, would "give *us* a little more flexibility in bringing some cases that otherwise would be [time] barred." *Id.* (emphasis added).

Similarly, Senator Grassley—lead sponsor of the 1986 amendments—noted that, in determining whether "the Government had knowledge" for purposes of the limitations period, "care should be taken to assure that the information has reached an official in a position both to recognize the existence of a possible violation of this act and to take steps to address it." 132 Cong. Rec. 20,530, 20,536 (1986). Congress enacted subsection 3731(b)(2) to benefit the government specifically. *See also* S. Rep. No. 99-345, at 30 (1986) (statute of limitations under subsection 3731(b)(2) begins to run when "material facts are known by an official within the Department of Justice with the authority to act in the circumstances").

Thus, "a civil action under section 3730" should not be read to extend subsection 3731(b)(2) to actions in which the government has not intervened. Subsection 3731(b)(2)'s reference to an "official of the United States" makes "perfect sense" when the government is a party to the action, but "no sense whatsoever" where the relator is the sole party litigating the alleged fraud against the defendant. *Sanders*, 546 F.3d at 294. The

relator's limitations period would then be governed by a non-party's knowledge, which "does not notify the relator of anything." *Id.*; *cf. United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 931-937 (2009) (the United States is not a party to False Claims Act actions in which it has not intervened).

The statute upon which subsection 3731(b)(2) was modeled further confirms that the longer limitations period applies only in cases in which the government intervenes. In drafting subsection 3731(b)(2), Congress looked to the general tolling provision in 28 U.S.C. § 2416(c). *Compare* 31 U.S.C. § 3731(b)(2) (action must be brought within three years of when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances") *with* 28 U.S.C. § 2416(c) (general statute of limitations excludes periods during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"); *see also* 132 Cong. Rec. at 20,536 ("The committee has added a tolling provision[] to the False Claims Act which is adopted directly from 28 U.S.C. § 2416(c)."). Subsection 2416(c) permits tolling *only* in actions brought by the government (and did so at the time Congress adopted subsection 3731(b)(2)). *See* 28 U.S.C. § 2416 ("Time for commencing actions brought by the United States—Exclusions"); Pet. App. 27a-28a. Subsection 3731(b)(2) should be so understood as well.

B. The Eleventh Circuit's decision gives rise to "counterintuitive results." *Graham County*, 545 U.S. at 415-421. This Court has "noted time and time again" that courts are "'obliged to give effect, if possible, to every word Congress used.'" *National Ass'n of Mfrs.*

v. *Department of Defense*, 138 S. Ct. 617, 632 (2018). Courts should not construe a statute in a way that would render a clause, sentence, or word "'superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001).

The Eleventh Circuit's interpretation of section 3731(b) renders subsection 3731(b)(1) "insignificant," even "if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Subsection 3731(b)(1) would be operative only when the relevant official of the United States knew or should have known facts material to the claims within three years of the alleged violation, in which case the three-year limitations period under subsection 3731(b)(2) would expire before the six-year limitations period under subsection 3731(b)(1). If the government learned of the alleged violation between three and ten years after the event in question, subsection 3731(b)(1) would have no effect. Accordingly, the Eleventh Circuit's reading resigns subsection 3731(b)(1) to "quite an insignificant role," *Duncan*, 533 U.S. at 175—especially considering that subsection 3731(b)(2) was enacted because fraud was "frequently" concealed from the government until the then-existing six-year statute of limitations ran out, *see House Hearings* 159 (statement of Assistant Attorney General Willard). *Cf. New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 681 (2010) (rejecting a reading that "dramatically undercuts the significance" of another statutory provision).

As the Fourth and Tenth Circuits noted, relators' financial incentives will further contribute to the marginalization of subsection 3731(b)(1), effectively rendering it "superfluous." *Sanders*, 546 F.3d at 295; *see Sikkenga*, 472 F.3d at 726 (applying subsection 3731(b)(2) to non-intervened suits would "eviscerat[e]" subsection

3731(b)(1) "in the vast majority of cases"). Those circuits reasoned that relators have "a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Sanders*, 546 F.3d at 295. Thus, relators would not opt to restrict their limitations period to six years under subsection 3731(b)(1); instead, they would take the full ten years allowed under the court of appeals' approach to subsection 3731(b)(2). *Id.*; *see also Sikkenga*, 472 F.3d at 726. Regardless of whether that is true in "nearly all False Claims cases," *Sanders*, 546 F.3d at 295, the Eleventh Circuit's reading certainly marginalizes the role of subsection 3731(b)(1) to the point of insignificance, particularly in light of the financial incentive for relators to wait before bringing their claims.

Extending subsection 3731(b)(2) to non-intervened suits would thereby undermine one of the purposes of the False Claims Act's *qui tam* provisions. Those provisions are intended "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot and will not"—in other words, "'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Sanders*, 546 F.3d at 295 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 547 (1943), *superseded by statute as stated in Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 412 (2011)); *see also Sikkenga*, 472 F.3d at 725. Even the Eleventh Circuit seemed to recognize the prompt combating of fraud as the overall goal of the False Claims Act, as evidenced by its discussion of the statutory incentives for prompt reporting. Pet. App. 23a-24a. Allowing relators to take advantage of subsection 3731(b)(2)'s longer limitations period in non-intervened suits undeniably interferes

with Congress's intent to "stimulate actions" to expose fraud. *Marcus*, 317 U.S. at 548; *see also Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (statutory interpretation "'depends upon reading the whole statutory text, considering the purpose and context of the statute'").

III. Allowing Relators To Lengthen The Limitations Period Under Subsection 3731(b)(2) Imposes Significant Burdens On False Claims Act Defendants

The significant burdens imposed by the Eleventh Circuit's interpretation of the False Claims Act provide an additional reason to grant certiorari. The three-way circuit split itself engenders uncertainty and subjects False Claims Act defendants to different risks based simply on where a lawsuit is brought. Petitioners in this case, for example, would have been entitled to dismissal in the Fourth, Tenth, and Ninth Circuits. Pet. App. 3a-6a. Because the relator brought suit in the Eleventh Circuit, however, petitioners would need to engage in costly discovery to determine the "identity and knowledge of a government official," *Sanders*, 546 F.3d at 295, even though the official is not a party to the action and the alleged violations occurred more than seven years before the relator filed suit. Such starkly different results caused by dint of geography and nothing else undermine the certainty that statutes of limitations are designed to promote. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14-15 (2014); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

Allowing the longer limitations period in relator-only suits is also unfair to False Claims Act defendants. This Court has repeatedly emphasized that statutes of limitations "embody a 'policy of repose, designed to

protect defendants'" by fostering "'elimination of stale claims." *Lozano*, 572 U.S. at 14; *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims."). Businesses that provide services to the government, like all businesses, are entitled to the "'security and stability to human affairs'" that are "'vital to the welfare of society'" and should not be "'surprise[d] through the revival of claims that have been allowed to slumber.'" *Gabelli* v. *SEC*, 568 U.S. 442, 448-449 (2013). The Eleventh Circuit's decision undermines that fairness by requiring False Claims Act defendants to litigate claims over alleged violations that occurred long ago.

That uncertainty imposes real costs. For example, businesses in the Eleventh and Ninth Circuits may need to incur additional expenses *ex ante* to preserve certain evidence due to the longer limitations period available to relators in non-intervened suits—costs that are not necessary in the Fourth and Tenth Circuits. And businesses in jurisdictions that have yet to decide whether subsection 3731(b)(2) applies to relator-only suits will be left to wonder whether they should plan for any contingencies.

Even apart from document retention, memories fade, witnesses may become unavailable over time, and other sources of proof may be lost. For example, many people change employers within ten years and those who remain may well have difficulty remembering events from a decade ago. Ten years is a very long limitations period. Congress decided it was appropriate to permit the government to pursue actions within a reasonable amount of time after it learned of the relevant facts. But that provides no justification for allowing

relators to drag their feet for up to a decade, especially considering Congress's intent to ferret out potential misconduct by encouraging the prompt filing of claims.

More broadly, False Claims Act litigation is time-consuming and costly. False Claims Act actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. They also frequently last a long time. As the Chamber has noted in another recently filed amicus brief before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Chamber of Commerce of the United States of America et al. Amicus Br. 13, *Gilead Scis., Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Discovery contributes to that financial burden. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1029-1030 (D.C. Cir. 2017). Moreover, the burden would be higher the longer a relator waited to file an action (as would be allowed under subsection 3731(b)(2)) because stale claims force "defendants and the courts ... to deal with cases in which the search for truth may be seriously impaired by the loss

of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. 111 at 117. *Cf.* Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-1265 (2008) ("most non-intervened suits exact a net cost on the public").

The Eleventh Circuit suggested that the discovery burden occasioned by its view of subsection 3731(b)(2) is overstated because the government's knowledge may be relevant to other defenses, such as showing that the defendant did not "'knowingly'" submit false claims or that the false statements were not "material" to the government's decision to pay. Pet. App. 22a-23a n.10 (citing 31 U.S.C. § 3729(a)(1) and *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)). But allowing relators to take advantage of the longer limitations period in non-intervened suits removes the threshold requirement that would have precluded any discovery on such issues in the first place. Those additional costs are undeniable.

The threat of discovery will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of a case. Only about 10% of non-intervened suits result in recovery, whether through settlement or final judgment, whereas 90% of the intervened actions lead to recovery. Pet. App. 11-12a. The difference in those rates cannot be explained solely by reference to the merits of the claims, *see* Pet. App. 12a n.6, but the correlations between the merits and the recovery rate cannot be ignored, either. If relators can lengthen their limitations periods under subsection 3731(b)(2) even when the government has not intervened, False Claims Act litigants are more likely

to settle those suits for fear of financial and reputational risk, even though the suits are frequently unmeritorious.

The cost of settlement in these circumstances can be enormous. The number of new *qui tam* False Claims Act matters has increased significantly, from 385 filed in 2006 to 674 in 2017. *See* U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://www.justice.gov/opa/press-release/file/1020126/download. By contrast, the number of government-initiated False Claims Act matters has remained relatively steady during this period, ranging from a low of 71 in 2006 to a high of 161 in 2008. (In 2017, there were 125.) *See id.* With the increase in *qui tam* actions, relators' recoveries have increased dramatically, including in non-intervened suits. In 2006, non-intervened actions resulted in roughly $22 million in recovery; in 2017, relators recovered approximately $425 million in non-intervened suits. *See id.*

The difficulties of dealing with stale claims reach beyond financial risk, as businesses may also suffer reputational hardship from simply having to defend a False Claims Act action. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices." Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 (2007). The reputational damages are worse if a relator's claims from long ago survive a motion to dismiss on limitations grounds. Such reputational risk, combined with financial harm, could lead some businesses to exit the government program altogether. *See* Memo. from Michael Granston, Dir., Commercial Litig. to Commercial Litig.

Branch, Fraud Sec. 5 (Jan. 10, 2018), https://drive.google.com/file/d/1PjNaQyopCs_KDWy8RL0QPAEIPTnv31ph/view ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry"); Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), https://www.law360.com/articles/924706/dod-buying-group-pushes-house-panel-for-rules-reform.

This Court's review is urgently needed to avoid all of these practical consequences of permitting stale claims, and to resolve the expanding circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPT. 7, 2018
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The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 16-12836	**Docketed:** 05/24/2016
Nature of Suit: 3890 Other Statutory Actions	**Termed:** 04/11/2018
Billy Hunt v. Cochise Consultancy, Inc., et al	**Case Handler:** Bergquist, Christopher, HH 404-335-6169
Appeal From: Northern District of Alabama	
Fee Status: Fee Paid	

Case Type Information:
1) Private Civil
2) Federal Question
3) -

Originating Court Information:
District: 1126-5 : 5:13-cv-02168-RDP
Civil Proceeding: R. David Proctor, U.S. District Judge
Date Filed: 11/27/2013
Date NOA Filed: 05/24/2016

Prior Cases:
None

Current Cases:
None

* * *

05/24/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Billy Joe Hunt on 05/24/2016. Fee Status: Fee Paid. No hearings to be transcribed. The appellant's brief is due on or before 07/05/2016. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on or before 06/08/2016 as to Appellant Billy Joe Hunt [Entered: 05/25/2016 10:19 AM]
	* * *
07/06/2016	*MOTION for extension of time to file appellants brief to 07/08/2016 at 04:30 pm filed by Billy Joe Hunt. Opposition to Motion is Unknown. [7840269-1]* (ECF: Gary Conchin) [Entered: 07/06/2016 09:51 AM]
	* * *
07/08/2016	Appellant's brief filed by Billy Joe Hunt. (ECF: Gary Conchin) [Entered: 07/08/2016 05:13 PM]
07/08/2016	Appendix filed [1 VOLUMES] by Appellant Billy Joe Hunt. (ECF: Gary Conchin) [Entered: 07/08/2016 05:14 PM]
07/11/2016	ORDER: Motion for extension to file appellant brief filed by

	Appellant Billy Joe Hunt is GRANTED by clerk. [7840269-2] Appellants brief due on 07/08/2016 with the Appendix due seven days after the filing of the appellant's brief. [Entered: 07/11/2016 10:06 AM]
	* * *
08/05/2016	Appellee's Brief filed by Appellee The Parsons Corporation. (ECF: Jackson Sharman) [Entered: 08/05/2016 03:30 PM]
	* * *
08/08/2016	Appellee's Brief filed by Appellee Cochise Consultancy, Inc.. (ECF: Duane Daiker) [Entered: 08/08/2016 03:32 PM]
	* * *
08/24/2016	Over the phone extension granted by clerk. Updated Reply Brief. Due on 09/08/2016 as to Appellant Billy Joe Hunt. [Entered: 08/24/2016 01:30 PM]
09/08/2016	Reply Brief filed by Appellant Billy Joe Hunt. (ECF: Earl Mayfield) [Entered: 09/08/2016 05:09 PM]
	* * *
09/15/2016	The Court has determined that oral argument will be necessary in this case. Please forward 3

	additional copies of the 1 volumes of Appendix filed 7/8/16 by Attorney Gary Vestal Conchin for Appellant Billy Joe Hunt to the Clerk's Office, Attention: Jenifer Tubbs. Your prompt attention to this matter is appreciated. [Entered: 09/15/2016 12:22 PM]
	* * *
11/21/2016	Oral argument scheduled. Argument Date: Tuesday, 01/24/2017 Argument Location: Atlanta. [Entered: 11/21/2016 04:01 PM]
	* * *
01/24/2017	Oral argument held. Oral Argument participants were Earl N. Mayfield for Appellant Billy Joe Hunt and Aaron S. Dyer for Appellee The Parsons Corporation. [Entered: 01/24/2017 01:08 PM]
04/11/2018	Opinion issued by court as to Appellant Billy Joe Hunt. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 04/11/2018 04:27 PM]

04/11/2018	Judgment entered as to Appellant Billy Joe Hunt. [Entered: 04/11/2018 04:31 PM]
	* * *
06/29/2018	Mandate issued as to Appellant Billy Joe Hunt. [Entered: 06/29/2018 11:55 AM]

U.S. District Court
Northern District of Alabama (Northeastern)
CIVIL DOCKET FOR CASE #: 5:13-cv-02168-LCB

Hunt v. Cochise Consultancy, Inc. et al
Assigned to: Judge Liles C Burke
Case in other court: USCA, 16-12836-DD
Cause: 31:3729 False Claims Act

Date Filed: 11/27/2013
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Date Filed	#	Docket Text
11/27/2013	1	COMPLAINT against Cochise Consultancy, Inc., The Parsons Corporation (Filing fee $ 400.), filed by Billy Joe Hunt.(KAM,) (Entered: 11/27/2013)

* * *

01/21/2014	2	STATUS REPORT filed by United States of America (ASL) (Entered: 01/22/2014)
02/10/2014	3	MOTION for Extension of Time by United States of America. (ASL) Modified on 2/13/2014 (ASL). (Entered: 02/13/2014)

02/10/2014	4	Brief re 3 MOTION for Extension of Time filed by United States of America (ASL) (Entered: 02/13/2014)
02/13/2014	5	ORDER granting 3 Motion for Extension of Time. Signed by Senior Judge Inge P Johnson on 2/13/14. (ASL) (Entered: 02/13/2014)

* * *

08/08/2014	7	MOTION for Extension of Time by United States of America. (Attachments: # 1 Affidavit)(PSM) (Entered: 08/11/2014)
08/11/2014	8	ORDER granting 7 Motion for Extension of Time. Signed by Senior Judge Inge P Johnson on 8/11/2014. (PSM) (Entered: 08/11/2014)
01/29/2015	9	NOTICE OF ELECTION TO DECLINE INTERVENTION by United States of America (PSM) (Entered: 01/29/2015)
01/29/2015	10	ORDER The United States having declined to intervene in this action, the Court rules as follows: IT IS ORDERED that, The complaint be unsealed and served upon the Defendants by the Relator; All other contents of the court's file in this action remain under seal except for this Order and The United

		States of America's Notice of Election to Decline Intervention The seal be lifted as to all other matters occurring in this action after the date of this Order; The parties shall serve all pleadings and motions filed in this action, including supporting memoranda, upon the United States. Signed by Senior Judge Inge P Johnson on 1/29/2015. (PSM) (Entered: 01/29/2015)

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06/02/2015	13	Case Reassigned to Judge R David Proctor. Senior Judge Inge P Johnson no longer assigned to the case. (KAM) (Entered: 06/02/2015)
06/03/2015	14	ORDER that the Relator shall file a status report by 6/12/2015 addressing his compliance 1/29/205 order 10 and the status of this matter. Signed by Judge R David Proctor on 6/3/2015. (KAM,) (Entered: 06/03/2015)
06/11/2015	15	RESPONSE to Court's June 3, 2015 Order for Status Report filed by Billy Joe Hunt. (Conchin, Gary) (Entered: 06/11/2015)

08/11/2015	16	ORDER-By 8/28/2015, the Relators SHALL procure the appearance of additional counsel and serve dft. Failure to comply will result in dismissal of this action. Signed by Judge R David Proctor on 8/11/2015. (AVC) (Entered: 08/11/2015)
08/27/2015	17	RESPONSE to 16 Court's Order of August 11, 2015 filed by Billy Joe Hunt. (Conchin, Gary) (Entered: 08/27/2015)
08/28/2015	18	ORDER OF DISMISSAL-Because the Relator has not procured the appearance of additional counsel, not served Dft, and not provided the court with any specifics about whether and when these talks will be completed, the Relator's request for additional time is DENIED. This case is DISMISSED WITHOUT PREJUDICE. Signed by Judge R David Proctor on 8/28/2015. (AVC) (Entered: 08/28/2015)
09/04/2015	19	MOTION to Reconsider, Alter or Amend Judgment 18 by Billy Joe Hunt. (Conchin, Gary) (Entered: 09/04/2015)
09/08/2015	20	ORDER granting 19 Motion to Reconsider, Alter or Amend Judgment. The Clerk is directed to reopen this case. By

		9/18/2015, new counsel for the Relator SHALL file an appearance. By 10/21/2015, the Relator SHALL serve Dfts with the Complaint. Signed by Judge R David Proctor on 9/8/2015. (AVC) (Entered: 09/08/2015)
09/17/2015	21	NOTICE of Appearance by Gary V Conchin on behalf of Billy Joe Hunt (Conchin, Gary) (Entered: 09/17/2015)

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09/22/2015	24	Summons Issued as to Cochise Consultancy, Inc., The Parsons Corporation; mailed certified mail. (AVC) (Entered: 09/22/2015)

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10/02/2015	28	SUMMONS Returned Executed The Parsons Corporation served on 9/25/2015, answer due 10/16/2015. (AVC) (Entered: 10/02/2015)
10/05/2015	29	SUMMONS Returned Executed Cochise Consultancy, Inc. served on 9/25/2015, answer due 10/16/2015. (AVC) (Entered: 10/05/2015)
10/15/2015	30	Unopposed MOTION to Extend the Responsive Pleading Deadline by The Parsons Corporation. (Sharman, Jackson) (Entered: 10/15/2015)

10/16/2015	31	**TEXT ORDER** - This matter is before the court on Defendant The Parsons Corporation's Unopposed Motion to Extend the Responsive Pleading Deadline. 30 . The Motion 30 is **GRANTED**. The deadline to respond to the Complaint is **EXTENDED** to **November 16, 2015**. Signed by Judge R David Proctor on 10/16/2015. (AVC) (Entered: 10/16/2015)

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10/16/2015	35	MOTION to Dismiss *Plaintiff's Complaint with Prejudice and Memorandum of Law* by Cochise Consultancy, Inc.. (Daiker, Duane) (Entered: 10/16/2015)

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10/23/2015	48	RESPONSE in Opposition to 35 MOTION to Dismiss Plaintiff's Complaint with Prejudice and Memorandum of Law filed by Billy Joe Hunt. (Attachments: # 1 Exhibit A)(Conchin, Gary) (Entered: 10/23/2015)
10/26/2015	49	REPLY to 48 Response in Opposition to Motion to Dismiss Plaintiff's Complaint with Prejudice and Memorandum of

		Law filed by Cochise Consultancy, Inc. (Warchola, Robert) (Entered: 10/26/2015)
11/16/2015	50	MOTION to Dismiss Plaintiff's Complaint with Prejudice and Memorandum of Points and Authorities in Support Thereof by The Parsons Corporation. (Sharman, Jackson) (Entered: 11/16/2015)
11/16/2015	51	REQUEST for Judicial Notice in Support of 50 Opposed Motion to Dismiss Plaintiff's Complaint with Prejudice by The Parsons Corporation. (Attachments: # 1 Exhibit A - Information (United States v. Hunt), # 2 Exhibit B - Judgment in a Criminal Case (United States v. Hunt)) (Sharman, Jackson) (Entered: 11/16/2015)
11/17/2015	52	**TEXT ORDER** - This matter is before the court on Defendant Parsons' Motion to Dismiss 50 . The parties are **REMINDED** to brief the Motion under Exhibit B to the court's Initial Order 36 . Additionally, Parsons' Request for Judicial Notice 51 is **GRANTED**. Signed by Judge R David Proctor on 11/17/2015. (AVC) (Entered: 11/17/2015)

11/18/2015	53	MOTION for Extension of Time by The Parsons Corporation. (Sharman, Jackson) (Entered: 11/18/2015)
11/18/2015	54	**TEXT ORDER** - This matter is before the court on Defendant's Motion for an Extension of Time 53 . The Motion 53 is **GRANTED**. Plaintiff **SHALL** respond to Defendant Parsons' Motion to Dismiss 50 **on or before December 1, 2015**. Defendant may reply **on or before December 8, 2015**. Signed by Judge R David Proctor on 11/18/2015. (AVC) (Entered: 11/18/2015)
11/19/2015	55	Joint MOTION to Stay *Discovery Pending Resolution of Dismissal Motions* by Billy Joe Hunt. (Conchin, Gary) (Entered: 11/19/2015)
11/19/2015	56	**TEXT ORDER** - This matter is before the court on the parties' Joint Agreed Motion to Stay Discovery Pending Resolution of Dismissal Motions 55 . The Motion 55 is **GRANTED**. Discovery is **STAYED**. The parties' obligations under Rule 26(f) **SHALL** run from the date of a decision on Defendants' pending Motions to Dismiss.

		Signed by Judge R David Proctor on 11/19/2015. (AVC) (Entered: 11/19/2015)
12/02/2015	57	Joint Agreed Motion to Extend Briefing Schedule on Defendant Parson's Dismissal Motion by Billy Joe Hunt. (Conchin, Gary) (Entered: 12/02/2015)
12/02/2015	58	**TEXT ORDER** - This matter is before the court on the parties' Joint Agreed Motion to Extend Briefing Schedule on Defendant Parsons' Dismissal Motion 57 . The Motion 57 is **GRANTED**. The Relator's response to Parsons' Motion **SHALL** be filed on or **before December 7, 2015**. Any reply **SHALL** be filed on or **before December 16, 2015**. Signed by Judge R David Proctor on 12/2/2015. (AVC) (Entered: 12/02/2015)
12/07/2015	59	RESPONSE to 50 Motion to Dismiss filed by Billy Joe Hunt. (Conchin, Gary) (Entered: 12/07/2015)
12/15/2015	60	REPLY in Support of 50 Motion to Dismiss Plaintiff's Complaint with Prejudice filed by The Parsons Corporation. (Sharman, Jackson) (Entered: 12/15/2015)

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04/28/2016	63	MEMORANDUM OPINION. Signed by Judge R David Proctor on 4/28/2016. (AVC) (Entered: 04/28/2016)
04/28/2016	64	ORDER OF DISMISSAL-For the reasons discussed in the memorandum opinion 63, the Motions to Dismiss 35 & 40 are GRANTED. The court hereby ORDERS that this action shall be, and is, DISMISSED WITH PREJUDICE. Costs are taxed against Relator Hunt. Signed by Judge R David Proctor on 4/28/2016. (AVC) (Entered: 04/28/2016)
05/24/2016	65	NOTICE OF APPEAL as to 64 Order Dismissing Case, 63 Memorandum Opinion by Billy Joe Hunt. Filing fee $505, Receipt# 1126-2628299 (ALND# B4601071607). Appeal Record due by 5/27/2016. (Conchin, Gary) Modified on 5/24/2016 (AVC). (Entered: 05/24/2016)

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06/29/2018	69	MANDATE of USCA before Wilson, Jill Pryor, USCJ, and Bartle USDJ, sitting by designation, for the reasons set forth in the Opinion, REVERSING

		the district court's order dismissing Hunt's FCA claim as time barred and REMANDING this case for further proceedings consistent with this opinion (Attachments: # 1 Opinion, # 2 Bill of Costs)(KAM) (Entered: 06/29/2018)
07/02/2018	70	ORDER On or before July 27, 2018, the parties SHALL conduct the parties planning meeting pursuant to Federal Rule of Civil Procedure 26(f) and file the appropriate report with the Clerk of Court. Upon receipt of the report, the court will schedule a Rule 16(b) scheduling conference. Signed by Judge R David Proctor on 7/2/2018. (KAM) (Entered: 07/02/2018)
07/06/2018	71	MOTION to Stay *Pending the Resolution of the Defendants' Petition for a Writ of Certiorari* by Cochise Consultancy, Inc., The Parsons Corporation. (Attachments: # 1 Memorandum in Support of the Unopposed Motion to Stay) (Doss, Jeffrey) (Entered: 07/06/2018)
07/09/2015	72	ORDER granting 71 Motion to Stay Litigation Pending the Resolution of Defendants Petition for a Writ of Certiorari;

		The parties SHALL file a joint report within three (3) days of any decision on Defendants anticipated petition. Signed by Judge R David Proctor on 7/9/2018. (KAM) (Entered: 07/09/2018)
10/25/2018	73	**Case Reassigned to Judge Liles C Burke. Judge R David Proctor no longer assigned to the case. (KAM) (Entered: 10/25/2018)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN ALABAMA

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UNITED STATES OF AMERICA ex rel. Billy Joe Hunt,

Plaintiffs/Relator,

v.

COCHISE CONSULTANCY INC. d/b/a COCHISE SECURITY
5202 Silverado Way
Valrico, Florida 33594,

and

THE PARSONS CORPORATION d/b/a PARSONS INFRASTRUCTURE & TECHNOLOGY
100 W. Walnut St.
Pasadena, California, 91124

Defendants.

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FILED UNDER SEAL

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT
UNDER THE FEDERAL FALSE CLAIMS ACT
(31 U.S.C § 3729 *et seq.*)

INTRODUCTION

This lawsuit alleges that the Defendants have defrauded the United States Department of Defense in connection with the provision of security services provided by The Parsons Corporation ("Parsons") and Cochise Consultancy Inc. d/b/a Cochise Security ("Cochise") as part of Prime Contract No. W912DY-04-D-0005, Parsons' Subcontract No. 800618-60006 and Parsons' Task Order 74475730003. As set forth below, Parsons and Cochise were in violation of the fundamental terms of the contracts and federal regulations pertaining to government acquisition of goods and services. Parsons and Cochise (collectively, "Defendants"), and/or their agents, employees and co-conspirators, knowingly submitted, caused and conspired to submit false claims for payment for the services rendered under the contracts, and in violation of the Federal Civil False Claims Act, 31, U.S.C. § 3729, *et seq*. Relator brings this civil action on behalf of and in the name of the United States of America to recover damages and civil penalties under the FCA, and alleges:

1. The FCA prohibits knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1)(A). Additionally, the FCA prohibits knowingly making, using, or causing to be made or used, a false or fraudulent record or statement (a) to get a false or fraudulent claim paid or approved by the federal government (or a government contractor, if the money to pay the claim comes from the government) or (b) to conceal, avoid, or decrease an obligation to pay or transmit money or property to the federal government. 31 U.S.C. §§ 3729(a)(1)(A),

3729(a)(1)(G), 3729(b)(2)(A)(ii). Courts have interpreted these provisions to impose liability and penalties upon all claims made under fraudulently-induced contracts. Any person who violates the FCA is liable for a civil penalty of up to $11,000 for each violation, plus three times the amount of the damages sustained by the United States. 31 U.S.C. § 3729(a)(1).

2. Defendants' scheme involved an undisclosed improper conflict of interest arising from the close personal relationship between Cochise President James Johnson and the primary Contracting Officer in Iraq for the Army Corps of Engineers, Wayne Shaw ("Shaw"). This relationship allowed Cochise to influence government employees and agents in a successful scheme to win lucrative government subcontracts or to obtain favorable specifications in government subcontracts, and to exclude competitors from eligibility and/or the ability to compete for subcontracts or specifications, and otherwise entered into anti-competitive agreements. These practices subverted regulations governing the competitive bid process for government subcontracts and violated laws, regulations, and contract provisions prohibiting conflicts of interest and the provision of gratuities to government officials to obtain favorable treatment.

3. Under a guise of unusual and compelling urgency, and in a time of war, Defendants enacted a concerted and coordinated effort to ensure that Cochise was awarded security subcontracts from Parsons despite the fact that Cochise's ability to perform the services and provide the materials required by the contracts was much more limited and expensive than any other known provider.

4. In return for the favorable treatment, Cochise plied Wayne Shaw ("Shaw") with unlawful

gifts and gratuities, including trips to Kuwait where he received additional gifts and gratuities for securing Cochise lucrative contracts with the Army Corp of Engineers.

5. Despite Wayne Shaw's duty to prevent even the appearance of a conflict of interest with contractors and subcontractors, Shaw reciprocated and encouraged the improper relationship with Cochise by giving Jesse Johnson and Cochise special treatment during their time in Iraq, including housing within the Corps of Engineers compound and the benefits contained therein, as well as unfettered and improper access to potential contract clients and exerting his influence on Contractors, including Parsons, to subcontract with Cochise.

6. Shaw's and Defendants' actions eliminated Cochise's competition and ensured that Cochise's services would be acquired, no matter how much they cost. As a result, Cochise sought and obtained higher prices for their services than the government would have paid if bidding were truly competitive, as required by federal laws.

7. Defendants' conduct violates the FCA in at least two ways. First, Defendants fraudulently induced the government to enter into subcontracts for the purchase of Cochise's services by (a) providing illegal gratuities and gifts to Shaw and his team to obtain favorable treatment; (b) conspiring with each other and with Shaw to rig the evaluation process of subcontracts to ensure the use of Cochise's services or to ensure the selection of Cochise as a prime subcontractor; and (c) otherwise subverting competition for the subcontracts at issue, including by entering into anti-competitive agreements. Because the contracts and purchases at issue were fraudulently induced,

every claim for payment under the contracts at issue is a false claim subject to liability and penalties.

8. Second, because Defendants had an affirmative legal obligation to "timely disclose" all credible evidence of the improper conflicts of interest and payment of illegal gratuities, the failure to make such a disclosure was a continuing false statement to the government in that Cochise and/or other Defendants had no knowledge of the conflicts of interest or illegal gratuities. The government's entry into subcontracts with Cochise, and payment of claims pursuant to those subcontracts was premised upon Defendants' continuing failure to disclose the existence of improper conflicts of interest and payments of illegal gratuities.

9. Defendants' scheme was extremely brazen. Cochise was able to secure lucrative government subcontracts despite its inability to meet contract specifications and perform the contracts as well as, or for less or even equal expense, to its competitors. Defendants successfully conspired to award Cochise the subcontract despite the fact some Parsons Senior Contract Administrators refused to award Cochise the subcontract due to obvious conflicts of interest, and had, in fact, already selected a competitor of Cochise to receive the contract before being ultimately overruled by their superiors at Parson and the Army Corp of Engineers.

JURISDICTION AND VENUE

10. This is a civil action by Plaintiff/Relator Billy Joe Hunt (hereinafter "Relator"), acting on behalf and in name of the United States, against all Defendants under the False Claims Act, 31 U.S.C.

§§ 3729 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345, and 31 U.S.C. § 3732(a).

11. This Court has personal jurisdiction over the Defendants pursuant to 31 U.S.C. § 3732(a), because that section authorizes nationwide service of process, and because each of the Defendants has minimum contacts with the United States. Each of the Defendants can be found in, resides in, or has transacted business in the Northern District of Alabama.

12. Venue is proper in this judicial district pursuant to 31 U.S.C. 3730(a) because each of the Defendants can be found in, resides in, or has transacted business in the Northern District of Alabama, and many of the alleged acts occurred in this judicial district. Defendants conduct business in this judicial district. Department of Defense contracts with private security firms are approved, executed and funded through governmental offices in this judicial district. Additionally acts proscribed by 31 U.S.C. § 3729 occurred in this judicial district. Parsons contracts with the Department of Defense were administered through the Army Corp of Engineers, whose primary acquisition offices are located in this judicial district, and the Defendants addressed false statements within the meaning of 31 U.S.C. § 3729 to the Department of Defense Army Corps of Engineers and in this judicial district.

13. The action is premised upon Defendants' scheme to defraud the United States by improperly submitting bids for subcontracts and then awarding subcontracts for security services in Iraq, thereby resulting in enormous overpayment by the United States for private military security services.

14. None of the allegations set forth in this Complaint are based on any public disclosure of information or transactions in a civil, criminal, or administrative hearing, in a congressional, administrative, or General Accounting Office Report, hearing, audit, or investigation, or from the news media.

15. Relator is an Original Source with direct and independent knowledge, within the meaning of 31 U.S.C. § 3730(e)(4)(B), derived from his employment with Parsons, of the information on which the allegations set forth in this Complaint are based, and he has voluntarily provided the information to the Government prior to the filing of this Complaint.

PARTIES AND OTHER RELATED PERSONS

16. Plaintiff/Relator is a resident of the state of Alabama and resides at 125 Royal Drive, Apartment 605, Madison, AL 35758. Relator is a U.S. Citizen.

17. Relator was first hired by Kellogg, Brown and Root ("KBR") as a Labor Foreman for the Log Cap contract and arrived in Iraq on July 28, 2003. In July of 2004, Relator was offered a job at Parsons and began employment as a Site Engineer. As a Site Engineer, Relator was responsible for building a new camp and coordinating construction with subcontractors at Camp Ashraf. In January 2005, Relator was promoted to Camp Ashraf Site Manager and was responsible for overseeing the completion of site construction. In September of 2005, Relator applied for and received a promotion to the position Northern Operations Deputy Program Manager ("DPM, Northern Ops") for Parsons entire Coalition Munitions Clearance Program ("CMC"). As DPM, Relator was responsible for managing the day-to-day operations of the

CMC including overseeing the scope of development, management and performance of the projects and ensuring that projects met their specified goals and objectives. The DPM is responsible for managing operations and personnel, along with the Project Manager ("PM"). During the time period of the false claims alleged herein, Relator worked as the Northern Operations DPM out of Parsons' Baghdad headquarters in Camp Victory, Iraq.

18. From November 30, 2010 to June 3, 2012, Relator voluntarily cooperated with the Federal Bureau of Investigations ("FBI"), the Internal Revenue Service's Criminal Investigation Service, the Defense Criminal Investigative Service ("DCIS"), the Special Investigator General for the Reconstruction of Iraq, and the Department of Justice for the purpose of assisting in an investigation of contract fraud occurring in Iraq. During this period, Relator admitted to participating in a kickback scheme related to his employment as a Deputy Project Manager for The Parsons Corporation. On October 10, 2012, Relator pled guilty to one count of Filing a False Tax Return and one count of Conspiracy to Commit Wire Fraud, Mail Fraud, and to Engage in Unlawful Kickbacks. For these crimes, Relator served 10 months and is presently in the process of paying restitution.

19. Now released, it is Relator's goal to ensure that the rampant war-time contract fraud of which he has personal and independent knowledge is fully exposed and addressed. To date, the Government has not prosecuted, criminally or civilly, all of the fraud that Relator exposed, and therefore, Relator brings this action under the federal False Claims Act based upon the information and documents he pro-

vided throughout his cooperation and unrelated to Relator's past conduct and crimes to which he pleaded guilty and was punished.

20. Defendant, The Parsons Corporation, provides engineering, construction, technical and management services, and performs services under contract with the United States Government in Iraq and Afghanistan. Parsons has 13,000 employees in all 50 states and in 25 locations worldwide. Parsons maintains offices in over 30 states and is headquartered in California at 100 W. Walnut St., Pasadena, CA, 91124. Parsons Corporation also maintains an office within the Northern District of Alabama at 401 Diamond Dr., Huntsville, AL 35806. Parsons' revenues in 2012 were $3 Billion.

21. Defendant Cochise Consultancy, Inc., contracts with the government to provide security services. Cochise is headquartered and maintains an office at 5202 Silverado Valrico, Florida, 33594. Cochise was founded in 1996 by Colonel Jesse L. Johnson (ret.) ("Johnson"). Cochise was awarded subcontract number 800618-60006, task order number 744757-30003 on or about February 20, 2006C (referred to as "Cochise subcontract" herein).

22. United States Army Corp. of Engineers ("USACE" of "CoE"), is part of the United States Department of Defense. As an agency of the United States, the CoE is responsible for entering into and administering contracts for services and material procurement related to the operations of the United States Armed Forces, including the building and maintenance of U.S. military bases and infrastructure in Iraq since the beginning of Operation Iraqi Freedom in March of 2003.

23. Wayne Shaw was the Project Manager for the CoE and was the government official with whom Cochise founder Jesse Johnson had close personal ties. Mr. Shaw specifically instructed Parsons Personnel, including Relator, to award the security subcontract to Cochise despite the obvious issues with the bid.

24. Steve Hamilton was the CoE Contract Officer ("KO") for the Parsons Prime Contract. A KO is responsible for entering into, administering, or terminating contracts on behalf of the United States Government. Prior to the receipt of the security subcontract by Cochise, Mr. Hamilton, at the direction of Wayne Shaw, issued a directive to Parsons Corporation to award the security subcontract to Cochise.

25. Hoyt Runnels was the Procurement Manager for Parsons and participated in the subcontract Selection Committee that originally selected the ArmorGroup as the recipient for the security subcontract. Mr. Runnels refused to sign the subcontract naming Cochise because of the patent defects in the Cochise bid, even after threats to his employment were made by the CoE, specifically Wayne Shaw

26. Dwight Hill, was a Senior Subcontract Administrator for Parsons. He replaced Hoyt Runnels in the contract negotiations after Mr. Runnels refused to sign the contract. Dwight Hill executed the contract naming Cochise as the supplier of the security services on February 21, 2006.

27. Adrian Quick was a Contract Specialist employed by Parsons and helped write the bid proposals for the security subcontract. Mr. Quick was also employed as Mr. Runnel's assistant in Iraq.

28. Michael Goodman was a Contract Specialist employed by Parsons and who helped write the bid proposals for the security subcontract with Adrian Quick.

29. Joe Bell was the Convoy Operations Manager for Parsons in Iraq. He was in charge of security for the entire CMC project. Mr. Bell worked with Adrian Quick to draft the bid proposals for the security subcontract. Mr. Bell was also the head of the Selection Committee that received and reviewed the bids and originally selected the ArmorGroup as the prime security subcontractor.

30. Gaines Newell was the Program Manager for Parsons' Coalition Munitions Clearance project. Mr. Newell also refused to sign the contract naming Cochise as the security subcontractor due to the fact that there were better bids submitted.

31. Karsten Rothenberg was a junior Vice President of Parsons who authorized the purchase of additional materials that was required due to Cochise's inability to supply the necessary equipment to perform on the subcontract.

32. Earnest O. Robbins III was the Senior Vice President of Parsons who authorized the purchase of additional materials that was required due to Cochise's inability to supply the necessary equipment to perform on the subcontract.

33. Robert Riendeau was a Parsons employee whose job was to coordinate the arrangements for individuals coming to and from Iraq through Kuwait. This included coordinating all transportation requirements for CMC personnel and work in conjunction with the other "meet and greet" subcontractors to assist personnel in their arrivals and departures.

34. Steven Michael Scales is Jesse Johnson's son-in-law. At one time he was employed by Palomino Security Consultancy, Inc. in Valrico, Florida. In September 2006 in Kuwait City, Mr. Scales was observed giving improper gifts and gratuities to Wayne Shaw after the award of the Cochise subcontract.

STATUTORY AND REGULATORY BACKGROUND

35. To ensure the integrity of its acquisition and contracting processes, the United States enacted certain provisions of the Federal Acquisition Regulation (the "FAR"), codified in Title 48 of the Code of Federal Regulations.

36. These codified standards are based upon a rich history of legislative intent and regulatory emphasis designed to ensure the open and unadulterated acquisition of goods and services by the United States Government and safeguarding the Treasury, and ultimately the taxpayers, from the harm effectuated by fraudulent procurement.[1]

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[1] *See* NetStar-1 Gov't Consulting, Inc. v. United States, 101 Fed. Cl. 511, 527 (Fed. Cl. 2011) aff'd, 473 F. App'x 902 (Fed. Cir. 2012) at Footnote 22: "Detailed regulatory guidance and restrictions regarding OCIs have existed since 1963. *See* DOD Directive 5500.10 (effective June 1, 1963), 32 C.F.R. § 141.2(b) (1966). These initial rules focused only on research and development contracts, but nonetheless emphasized that their primary objective was to prevent government contractors from obtaining "unfair competitive advantage." 32 C.F.R. § 1.141.2(a); *see also* James W. Taylor, Organizational Conflicts of Interest in Department of Defense Contracting, 14 Pub. Cont. L.J. 158, 159 (1983) (discussing the history of OCIs in defense acquisitions). FAR subpart 9.5, portions of which were first adopted in 1983, see Fed.Reg. 42142 (1983), was designed to preserve the existing DoD policy, albeit while expanding its coverage beyond the realm of research and development contracts. *See* Taylor and Dickson,

37. The government requires that the contractors with whom it does business "conduct themselves with the highest degree of integrity and honesty." 48 C.F.R. § 3.1002. One explicit - and obvious - component of that requirement is that government contractors must not provide bribes or illegal gratuities to government officials in order to secure favorable treatment.

38. It is a crime for any person to give, or to promise to give, "anything of value to any public official" - including "an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof" - with "intent ... to influence any official act ..." or "because of any official act performed or to be performed" by the public official. 18 U.S.C. § 201. The FAR incorporates this prohibition into all government contracts worth more than $5 million and with a duration of longer than 120 days in at least three ways:

39. First, each such contract must contain a clause providing that:

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supra, at 111. See also, House Comm. on Gov't Operations, Avoiding Conflicts of Interest in Defense Contracting and Employment, H.R.Rep. No. 917 (1963); House Comm. on Gov't Operations, Air Force Ballistic Management (Formation of Aero Space Corporation), H.R.Rep. No. 324 (1961); House Comm. on Gov't Operations, Organization and Management of Missile Programs, H.R.Rep. No. 1121 (1959); The 1963 report expressed concern regarding the appearance of organizational conflicts, noting that such appearances having "the same detrimental effects" as actual conflicts. Similar concerns were expressed by Congress in adopting the authorization act that led to the most recent amendment of the FAR's OCI regulations. See The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub.L. 110-417, § 841 (codified at 41 U.S.C. § 405C).

> The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed - (A) a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (B) A violation of the civil False Claims Act
>
> ....

48 C.F.R. § 3.1003(a); 48 C.F.R. § 52.203-13(b)(3)(i). The contractor also must "include the substance of this clause ... in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days." 48 C.F.R. § 3.1003(a); 48 C.F.R. § 52.203-13(d).

40. Second, each such contract must contain a clause permitting the government to terminate the contract if the contractor "(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and (2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract." 48 C.F.R. § 3.202, 48 C.F.R. § 52.203-3. This provision has been required in government contracts above the $5,000,000/120-day threshold since 1996.

41. Third, the FAR provides that, irrespective of the inclusion in the applicable contract of the clause described in paragraph 36, the government may suspend or disbar a contractor for the "knowing failure by a principal to timely disclose to the Government ... credible evidence of a violation of Federal criminal law involving fraud, *conflict of interest*, bribery, or *gratuity violations* found in Title 18 of the United States code or a violation of the civil False Claims Act." 48 C.F.R. § 52.203-13.

42. Laws and clauses required to be included in government contracts also prohibit the payment of money or gratuities to prime contractors for the purpose of obtaining or rewarding favorable treatment in connection with a government prime contract. 41 U.S.C. § 5253; 48 C.F.R. §§ 3.502-3, 52.203-7.

43. Together, these provisions render compliance with anti-bribery and anti-gratuity laws an explicit condition of participation in government contracts. Moreover, contractors have a continuing affirmative obligation, founded in both regulatory and contract provisions, to "timely disclose" all "credible evidence" of the payment of illegal gratuities. The failure to make disclosure of "credible evidence" of the payment of illegal gratuities constitutes a continuing false statement that the contractor has no knowledge of the payment of such gratuities to government officials. Defendants knowingly failed to make such disclosures to obtain the contracts at issue initially and later to induce the government to pay claims.

44. In addition, the government's policy is "that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contractors." 48 C.F.R. § 6.101. The FCA imposes liability and penalties on all claims

submitted under government contracts that were fraudulently induced, including by payment of illegal gratuities or schemes to subvert competition in contract bidding

45. Government contracting officers are further required to analyze acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the procurement process as possible and to avoid or mitigate significant potential conflicts of interest before contract award. Contracting officers must formally document their decisions regarding and determinations of potential organization conflicts of interest when a substantive conflict exists. If a conflict exists, and the contracting officer finds that it is in the best interest if the United States to award the contract notwithstanding the conflict, a waiver shall be submitted and included in the contract file. 48 C.F.R. § 9.504.

FACTUAL ALLEGATIONS

a. The Parsons Prime Contract for Coalition Munitions Clearance

46. On September 30, 2004, the Department of Defense by and through the Department of the Army awarded Parsons' subsidiary, Parsons Infrastructure and Technology, Inc., a services contract for the clean-up of excess munitions left by retreating or defeated enemy forces, and discovered by Coalition troops. The contract was identified by IDV Procurement Instrument Identification No. W912DY040005 and pertained to "Engineering Services" described by Principal NAICS Code 541330.

47. This initial contract was valued at $60,000,000 with a scheduled completion date of June

6, 2005. This was the largest contract for Parsons with the Department of Defense in 2004.

48. The contract was awarded using Parsons' Vendor DUN No. 006908511 and Global DUNS Number 030866545.

49. This contract and the work it called for became widely known as the Parsons Coalition Munitions Clearance Project ("CMC").

50. Part and Parcel to effectuating aims and goals of the CMC, Parsons was required and authorized to subcontract facets of the CMC project to other companies who specialized in particular areas requisite to the handling, disposal, and tracking of munitions.

51. One facet of the CMC project was to provide adequate security to the employees of Parson, their subcontractors, Iraqi nationals, and others who worked on the CMC project.

52. The Parsons Prime Contract and the process of subcontracting companies to assist on performing CMC, including subcontracts for security services, was governed by the basic set of federal regulations relating to federal procurement are contained in the Federal Acquisitions Regulation ("FAR"). 48 C.F.R. 1, *et seq.*

53. From January 6, 2006, to February 21, 2006, Parsons CMC Procurement Department received 231 requisitions for materials and processed 83.69% of them within that period. Parson also issued 191 subcontracts as part of the CMC during that period and had assigned 68.58% of them to subcontractors at that time.

54. One of these subcontracts was Subcontract No. 800618-60006 and Parsons' Task Order 74475730003, the "Cochise Subcontract."

b. The Cochise Subcontract for Security Services

55. On February 4, 2006, Parson solicited bids by way for issuing a Request for Quote ("RFQ") for services described as:

> "... security personnel to provide security support for various logistical convoys required to support the CMC mission. In addition to the regular logistics convoys, the security contractor will be responsible for Personnel Security Detail (PSD) support for Parsons and their client, the US Army Corps of Engineers, and for the movement of Class V materials as part of the CMC mission inside of Iraq."

56. The RFQ included the specification that Bidders account for the provision of all materials to supply mobile armored vehicle logistical support convoy teams and their services known as "mobile team support activities."

57. In response, Parsons received at least four different bids from foreign and American companies in Iraq providing security services, including, ArmourGroup, Aegis, Sabre, and others.

58. On February 16, 2006, Senior Subcontract Administrator D.E. "Dwight" Hill for Parsons issued a Limited Notice-to-Proceed for Logistical Convoy Security under Parsons BOA 800619-60006 to Cochise.

59. On February 21, 2006, as part of the CMC project, Parsons subcontracted with Cochise to provide the security services. Prior to this award, the subcontract award process was fraught with infighting and strife between the CoE, Parsons, and Cochise personnel.

60. It was known by the Parsons PM, DPM, and Contract Administration personnel that, on February 6, 2006, Cochise was outwardly upset that it had not received an RFQ to submit a bid, but Cochise had not been given an RFQ because it had not submitted proper proof of insurance, and clearly Cochise was aware that the subcontract required a bidding process.

61. Upon information and belief, during the 10-day period to submit a proposal in response to the RFQ, Wayne Shaw verbally expressed his desire that Cochise be awarded the subcontract despite the fact that they did not receive an RFQ.

62. On February 13, 2006, Hoyt Runnels and Gaines Newell discussed the fact that if the CoE wanted the bid to be directed to a particular subcontractor, they would need to receive a directive from the CoE, but had not yet received any such directive.

63. Never before had Parson received a directive form the CoE on the CMC project.

64. On February 14, 2006, Parsons' Evaluation Group, a committee to review subcontract bids which included Hoyt Runnels, Mike Goodman, Joe Bell and Adrian Quick, reviewed at least three bids that were submitted to Parsons for the security services subcontract. These bids were submitted blindly, meaning that each company was unknown to the Evaluation Group and only labeled as "Company A",

"Company B" and "Company C." Based on the bids submitted, the Evaluation Group, by majority vote, selected a subcontractor based on its track record of providing convoy support, their quality of work transporting personnel with lower fatalities, their experience in Iraq, and the fact that the company's bid included 25 more personnel on the ground, their own vehicle support and their our life support (living quarters, camp services, medical, and food). After selecting the award recipient, the Evaluation Committee learned the recipient of the award was ArmourGroup.

65. Later that day, February 14, 2006, CoE Program Manager Wayne Shaw learned of the Evaluation Group's decision. Shaw was a close personal friend to Colonel Jesse L. Johnson (ret.), President of Cochise, who was staying in Iraq at the time. Despite the policy that the CoE's compound was off limits to subcontractors, because of Shaw and Johnson's close friendship, Relator observed that whenever Johnson visited Camp Victory, he would eat, sleep, shower, and spend significant time at the CoE's office/compound. Johnson frequently enjoyed the benefits afforded to CoE personnel therein. Relator knew of no other subcontractor who was allowed to stay at the COE's compound other than Johnson.

66. In fact, Parsons had strict rules that prohibited subcontractors from interacting with their "client," the Army Corp of Engineers.

67. On February 14, 2006, Relator was called into Shaw's office and was told by Shaw that no matter what decision had already been made by the Evaluation Group, the subcontract was to be awarded to Cochise.

68. Never before had Wayne Shaw overruled the Evaluation Committee.

69. Relator emailed Hoyt Runnels requesting a directive awarding the subcontract to Cochise, however, Runnels stated he any such directive would have to come directly from CoE, not procurement, because it would constitute a conflict of interest. Then, Relator observed Shaw create and deliver a forged directive to Steve Hamilton, who was the CoE contracting officer for Parsons on the Prime Contract, rescinding the award of the subcontract to ArmorGroup.

70. Mr. Hamilton is legally blind and trusted Shaw that with the substance of what he was signing because he had worked with Shaw and had relied on Shaw to assist him in his duties at CoE and to drive him around Camp Victory. After the directive was signed by Hamilton, Shaw submitted the award for the security services to Cochise to Runnels, however, Runnels refused to execute the directive. Shaw issued threats to Runnels, but Runnels would not budge in his position because he was part of the Evaluation Group who had made the initial award and knew the award to Cochise was false and in violation of government regulations.

71. Parsons employees, including Relator, had witnessed Wayne Shaw terminate others' employment in Iraq on previous occasions, and his threats to Runnels were considered serious.

72. Karsten Rothenberg was a junior Vice President of Parsons and he also received a copy of Shaw's forged directive and eventually authorized the additional expense for the vehicle that Cochise could never provide.

73. Relator personally observed all of the forgoing events on February 14, 2006, and his co-workers at Parsons came to nickname this day as the "Valentine's Day Massacre."

74. Following these events, on February 16, 2006, Adrian Quick sent an email to Dwight Hill requesting he obtain additional information from Sabre and ArmorGroup. Hill responded to Quick questioning him whether he was acting on the direction of Gaines Newell or Hoyt Runnels, because he understood the contract was to be awarded to Cochise based on the circumstances surrounding the award. Quick responded to Hill that Cochise could not provide vehicles and could only provide personnel and that he anticipated the CoE would rescind the award to Cochise. Gaines Newell brought the forged directive to Hamilton's attention and Hamilton immediately rescinded the directive to award the subcontract to Cochise.

75. The armored vehicles were considered a critical element of the contract specifications because they were constantly being destroyed by roadside bombs and gunfire. The provision of security vehicles was an expensive endeavor for any security company operating in Iraq at this time.

76. Despite this, on February 21, 2006, Dwight Hill sent an email containing a Limited Notice to Proceed and explaining that a Task Order or an extension of the LMNP would be forthcoming for the award of the subcontract to Cochise. Attached to the email was an interoffice correspondence to the file prepared that same day by Hill that stated "the subject award is being made in accordance with FAR 6.302-2(b) – Unusual and compelling urgency." Hill's interoffice correspondence explains that there was an "urgent and immediate need" for convoy services and

falsely stated that Cochise had "on the job" familiarity with the mission that other security providers did not have. Hill used this supposed "urgency" and false lack of other providers with necessary capabilities to make a "sole source award" even though there were other bidders with similar or superior capabilities, to Cochise. Even during this time, there were questions about Cochise's capabilities to provide security services under the contract, and Quick suggested in response to Hill's that Cochise not be primarily designated as a "Class V and PSD primarily."

77. Dwight Hill's written justification for the awarding the subcontract provides insufficient information and fails to fully consider all elements required by FAR 6.302-2(b).

78. Prior to this incident, every subcontract issued by Parsons in Iraq for the CMC had been put through a complete bid process. The Cochise subcontract was the first bid that Parsons ever relied upon FAR 6.302-2(b) to justify a no–bid subcontract.

79. As a result of these false claims, the government paid in excess of $1 million more per month between February 2006 and September 2006 than it should have had ArmorGroup performed the contract. Additionally, Cochise's bid, unlike the other two company's bids, did not include any armored security vehicles. Therefore, when Cochise tried to provide security services under the contract, the government was forced to pay an excess of $2.9M in order for Cochise to acquire the requisite vehicles.

80. At the end of September 2006, Wayne Shaw rotated out of Iraq, and Parsons immediately reopened the Cochise security subcontract for bidding and the contract was awarded finally to ArmorGroup.

81. After Wayne Shaw left Iraq he traveled to Kuwait City. There he was observed by Robert Riendeau, a Parsons employee, being picked up and escorted around the city by Jesse Johnson's son-in-law Steven Michael Scales.

82. Relator has knowledge that Shaw spent three days in Kuwait City with Scales, where he was given improper gifts and gratuities for his efforts in securing government contracts and subcontracts for Cochise Consultancy, Inc.

DEFENDANTS' FALSE CLAIMS ACT VIOLATIONS

83. The False Claims Act ("FCA"), as amended, provides in pertinent part that:

> [A]ny person who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; ... or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,500 and not more than $11,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990...plus 3 times the amount of damages which the Government sustains because of the act of that person.

U.S.C. § 3729(a)(1)

84. The terms "knowing" and "knowingly" in the FCA provision above "mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). No proof of specific intent to defraud is required. 31 U.S.C. § 3729(b)(1)(B).

85. The Conduct described above violated the False Claims Act in at least three ways:

86. First, Defendants' conduct fraudulently induced at least one government subcontract, including the Cochise Subcontract. Cochise, through their instrumentality Wayne Shaw, and Parsons, through Dwight Hill partnered to use a combination of influence and favoritism to ensure that Cochise, with a far inferior bid to others, was awarded Subcontract No. 800618-60006 and Parsons' Task Order 74475730003.

87. In addition, Defendants agreed to work as a team to obtain the contract Award for Cochise to the exclusion of competitors and at the expense of fair competition.

88. Second, Defendants failed to timely disclose, as explicitly required by law and, on information and belief, by contract, their knowledge of Conflicts of Interest and the payment of illegal gratuities to public officials. Had Defendants disclosed that they had arranged the Cochise Subcontract through benefits provided by a close personal relationship between Jesse Johnson and Wayne Shaw, they would never have been awarded the contracts in the first place. Defendants' failure to make the required "timely disclosure" was, in effect, a continuing false statement that they

had no knowledge of the conflict of interests or the payment of illegal gratuities, made for the purpose of enabling Defendants to obtain and receive payment on government subcontracts.

89. Defendants used the above-described conduct to obtain subcontracts, and specifications under the CMC program from some time prior to January 2006 until early 2007. They used the above-described conduct to obtain and award the Cochise Subcontracts, Defendants are continuing to seek further government contracts, subcontracts, and specifications today. Defendants knew, or recklessly disregarded, that their conduct was illegal and fraudulent. The prohibition on the appearance of conflicts of interest, the unmitigated conflicts of interest and gratuities to public officials is stated clearly and repeatedly in the United States Code, the Code of Federal Regulations, and, on information and belief, in the contracts at issue in this case. As contractors with substantial government business (and with numerous sales and management positions dedicated to sales to the federal government), Defendants knew that the law prohibited them from buying or exploiting government influence and favoritism with gratuities and personal relationships.

90. Through their conduct and agreements, which were intended to and did eliminate competition for the Cochise subcontract at issue, Defendants were able to charge higher prices for their goods and services under the CMC program than the government would have paid if the bidding and specification process were conducted in a fair and competitive manner.

91. Upon information and belief, the aforementioned conduct represents a concerted conspiracy by the Defendants, and others, to improperly and

fraudulently award the Cochise Subcontract to Cochise Consultancy, Inc.

STATEMENT OF CLAIMS

Violation of Federal False Claims Act31 U.S.C. §§ 3729(a)(1)(A)-(C), (G) (Against All Defendants)

92. Relator realleges and incorporates by reference the allegations contained in the previous paragraphs of this Complaint.

93. This is a claim for treble damages and penalties under the False Claims Act, 31 U.S.C. § 3729, et seq.

94. As a result of the above-described conduct, including the existence of an improper conflict of interests, the payment of illegal gratuities and the subversion of the competitive bid process, Defendants' subcontracts with the government under the CMC program, for the purchase of Cochise's services were induced by fraud.

95. By virtue of the acts described above, Defendants knowingly presented, or caused to be presented, false or fraudulent claims to the United States government for payment or approval, and/or presented false or fraudulent claims to contractors, grantees, or other recipients seeking payment of money provided by the United States government or to be reimbursed by the United States government to be spent or used on the government's behalf or to advance a government program or interest.

96. By virtue of the acts described above, Defendants knowingly made, used, or caused to be made or used false records and statements, and omitted material facts, material to false and fraudulent claims.

97. By virtue of the acts described above, including their failure timely to disclose to the Government all evidence of violations of conflicts of interests, bribery and gratuities laws as required by regulation and contract, Defendants knowingly concealed or knowingly and improperly avoided obligations to pay or transmit money or property to the Government.

98. Each claim Defendants submitted, whether to the United States or to a contractor, under each contract with respect to which Cochise, Parsons, Jesse Johnson and Wayne Shaw, together, or in any related capacity, had any responsibility constituted a false claim.

99. Each such claim was tainted by Defendants fraudulent conflicts of interest and the provision of illegal gratuities and collusion between Cochise, Parsons, Jesse Johnson and Wayne Shaw, eliminated competition and resulted in the fraudulent award of subcontracts or contracts.

100. Additionally, each statement Defendants made to the government that failed to timely discharge their affirmative obligation to disclose the mere appearance of conflicts of interest, actual conflicts of interest, and known credible evidence of the provision of illegal gratuities to Wayne Shaw represents a false record or statement to get false or fraudulent claims paid by the government.

101. By virtue of the acts described above, Defendants knowingly made, used, or caused to be made or used false records and statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government. Each document or statement made, used, or caused to be made or used for this purpose is a false claim.

102. By virtue of the acts described above, Defendants knowingly conspired with each other, and all Defendants conspired with Wayne Shaw as described above, to commit violations of 31 U.S.C. § 3729(a)(1)(A), (B), and (G).

103. Relator cannot at this time identify all of the false claims that were caused by Defendants' conduct. Documentation of such claims is in the possession of the government and the Defendants, and Relator has no access to such records.

104. The government, unaware of the falsity of the records, statements and claims made or caused to be made by the Defendants, paid and may continue to pay the claims that would not be paid but for Defendants' illegal conduct and/or continues to provide the money requested or demanded from a government contractor or reimburse the contractor for money that is requested or demanded, and failed and continues to fail to recover money and/or property due from Defendants to the government.

105. By reason of Defendants' acts, the United States has been damaged, and continues to be damaged, in substantial amount to be determined at trial.

TOLLING OF STATUTE OF LIMITATIONS

106. Any applicable Statute of Limitations to Relators claims have been tolled by 18 U.S.C.A. § 3287.

PRAYER

WHEREFORE, Relator prays for judgment against the defendants as follows:

1. That Defendants cease and desist from violating 31 U.S.C. § 3729, et seq.;

2. That this Court enter judgment against Defendants in an amount equal to three times the amount of damages the United States has sustained because of defendants' actions, plus a civil penalty of not less than $5,500 and not more than $11,000 for each violation of 31 U.S.C. § 3729;

3. That Relator be awarded the maximum amount allowed pursuant to § 3730(d) of the False Claims Act;

4. That Relator be awarded all costs of this action, including attorneys' fees and expenses; and

5. That Relator recover such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, RELATOR HEREBY DEMANDS TRIAL BY JURY.

Dated this 27th Day of November, 2013, by:

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No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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QUESTION PRESENTED

The False Claims Act establishes two distinct statute-of-limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Neither The Parsons Corporation nor Cochise Consultancy, Inc. has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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BRIEF FOR PETITIONERS

The Parsons Corporation ("Parsons") and Cochise Consultancy, Inc. ("Cochise") respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

OPINIONS BELOW

The opinion of the court of appeals is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing a petition for a writ of certiorari until September 8, 2018. No. 17A1390. The petition was filed on September 7, 2018, and granted on November 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in full in the Addendum to this brief.

STATEMENT

The False Claims Act authorizes both the United States and private individuals, known as relators, to pursue civil claims for fraud perpetrated against the government. 31 U.S.C. § 3730(a)–(b). Until 1986, the False Claims Act had a single statute of limitations that required suit to be brought within six years of the alleged fraud. *Id.* § 3731(b)(1). In that year, prompted by concerns that the government was sometimes unable to discover the fraud and prepare a complaint within six years, Congress added a second limitations period. Drawing upon the language of a statute that tolls the generally applicable limitations periods for claims filed by the United States, 28 U.S.C. § 2416(c), Congress added 31 U.S.C. § 3731(b)(2), which states that suit may be brought within three years of when "the official of the United States charged with responsibility to act in the circumstances" learns the "facts material to the right of action" but no later than 10 years after the alleged violation.

Respondent Billy Joe Hunt learned of the alleged fraud in this case in 2006 but waited seven years to file this False Claims Act suit. Even though the United States declined to intervene in the suit—and the concerns that led Congress to enact Section 3731(b)(2) therefore were not implicated—the Eleventh Circuit held that Hunt could invoke the three-year limitations period in Section 3731(b)(2). The court further held that, even though Hunt had known about the alleged fraud for seven years, the complaint should not be dismissed as time-barred because he filed suit within three years of informing the government of the alleged fraud.

The Eleventh Circuit's dual holdings—that relators may invoke Section 3731(b)(2) in suits where the United States itself is not a party, and that the limitations period in such cases is triggered by the knowledge of the United States government, rather than the knowledge of the relator—rely on a hyperliteral reading of the statutory language that this Court has explicitly disavowed when construing this same statutory provision. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). When the language of Section 3731(b)(2) is read "in context," *id.* at 415, and in light of the statutory structure, purpose, and history as well as the obligation to avoid "counterintuitive results" where possible, it becomes apparent that Section 3731(b)(2) is only available where the government filed suit or intervened in the action. *Id.* at 421.

Moreover, even if Section 3731(b)(2) can be invoked by a relator in the absence of government intervention, this Court should mitigate the congressionally unintended, arbitrary consequences of that interpretation by holding that the limitations period in such cases is triggered by the knowledge of the relator, not the United States government.

Either of these alternative readings of Section 3731(b)(2) is sufficient to compel reversal and the dismissal of Hunt's untimely complaint.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). The False Claims Act has been amended on multiple occasions since then, and, in its current iteration, it imposes civil liability in the form of treble damages,

as well as civil penalties, on persons who make false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a); *see also* 28 C.F.R. § 85.3(a)(9) (inflation adjustment establishing civil penalties of up to $11,000 per claim for violations before November 2, 2015).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by a private relator suing on the federal government's behalf, *id.* § 3730(b)(1).[1] A relator may recover up to 30% of the proceeds of a successful action, as well as attorneys' fees and costs. *Id.* § 3730(d). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. The government then elects either to intervene in the suit or to allow the relator to continue the suit alone. *Id.* § 3730(b)(2).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5, 100 Stat. 3153, 3158 (1986). Before that date, the False Claims Act's limitations provision simply provided that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). The 1986 amendment added a second, alternative limitations deadline of "3 years after the date when facts material to the right of action are known or reasonably should have been known by the

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[1] Section 3730(h) also creates a private right of action for individuals who believe they have been retaliated against by their employers for assisting in a False Claims Act investigation or proceeding.

official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). In enacting that amendment, Congress incorporated into the False Claims Act the language of 28 U.S.C. § 2416(c), which tolls the generally applicable statutes of limitations on claims filed by the United States when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances."

Although the statute of limitations in Section 3731(b) applies, without qualification, to a "civil action under section 3730," this Court recognized in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson* that Congress "used the term 'action under section 3730' imprecisely in § 3731 and . . . sometimes used the term to refer only to a subset of § 3730 actions." 545 U.S. at 418. The Court held that Congress did just that in Section 3731(d)—a provision establishing the burden of proof in False Claims Act suits—where it used the phrase "action brought under section 3730" to refer only "to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Id.* The Court found similar "imprecis[ion]" in Section 3731(b)(1), which—notwithstanding its broad reference to a "civil action under section 3730"—does not apply to False Claims Act retaliation actions under Section 3730(h) because applying Section 3731(b)(1), rather than the most analogous state statute of limitations, could lead to the anomalous outcome of a claim's being "time barred before it ever accrues." *Id.* at 421.

2. Parsons is an engineering, construction, technical, and management firm that provides services to federal, regional, and local government agencies, as well as to private industrial customers worldwide. Parsons performed numerous contracts for the United States government during the Iraq and Afghanistan wars, including a U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the clean-up of munitions left behind by retreating or defeated enemy forces. Pet. App. 3a–5a. Cochise is a security-services firm that contracts with both the government and government contractors. Cochise was awarded a subcontract and task orders by Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and Iraqi nationals, among others. *Id.*

Respondent Billy Joe Hunt is a former Parsons employee who worked in Iraq on the CMC contract. Pet. App. 3a–5a. In his complaint, he alleges that, "some time prior to January 2006 until early 2007," petitioners defrauded the United States in connection with the CMC security subcontract awarded to Cochise. J.A. 44a.

According to Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Hunt alleges, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id.* at 3a–4a. When the Parsons employees initially refused to issue the directive, Shaw allegedly forged one, *id.* at 4a, which Hunt claims to have personally observed, J.A. 39a.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id.*

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. Pet. App. 5a. As part of that interview, Hunt told the agents about the allegedly fraudulent scheme involving Cochise and Parsons relating to the munitions-clearing project. *Id.* Hunt was charged with federal crimes for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed this False Claims Act suit against petitioners under seal on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a. The United States declined to intervene, and the complaint was thereafter unsealed. *Id.*

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. Pet. App. 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but maintained that the action was nevertheless timely under Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed

the government of the alleged fraud during his 2010 FBI interview. *Id.*

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Explaining that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," the court held that the complaint was time-barred under either interpretation of Section 3731(b)(2) adopted by the courts of appeals. Pet. App. 36a–40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations either was unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id.* at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed. Explicitly rejecting the contrary conclusions of the Fourth and Tenth Circuits, the court of appeals held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened. Pet. App. 14a, 21a (citing *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit reasoned that "the phrase 'civil action under section 3730' in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene" and that "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene." *Id.* at 14a.

In so ruling, the Eleventh Circuit acknowledged this Court's statement in *Graham* that "Congress used the phrase 'action under section 3730' imprecisely throughout § 3731 'to refer only to a subset of § 3730 actions.'" Pet. App. 17a n.8 (quoting *Graham*, 545 U.S. at 417–18). The court of appeals nevertheless concluded that the type of "'counterintuitive results'" that prompted the Court to reject a literal reading of Section 3731(b) in *Graham* are not implicated in this case. *Id.* at 16a (quoting *Graham*, 545 U.S. at 421). In particular, the Eleventh Circuit rejected the Fourth Circuit's reasoning that Congress could not have intended to create the "'bizarre scenario'" where a "limitations period [is] triggered by a federal official's knowledge when the United States is not a party" to the case. *Id.* at 18a (quoting *Sanders*, 546 F.3d at 293). According to the Eleventh Circuit, although "it is generally the case that a discovery-based limitations period begins to run when a *party*—the plaintiff—knew or should have known about the fraud or claim," it would not be "absurd to peg a limitations period to a federal official's knowledge" where the United States is not a party to a False Claims Act case because "the United States remains the real party in interest and retains significant control over the case" even when it has not intervened. *Id.* at 19a.

In accordance with that reasoning, the court further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the United States government's knowledge of the alleged False Claims Act violation, not by the relator's knowledge. Pet. App. 30a. Rejecting the Ninth Circuit's view that by suing on behalf of the government, "the relator [becomes] a government agent and the government official charged with responsibility to act," the Eleventh

Circuit reasoned that "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." *Id.* (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Applying those dual holdings, the Eleventh Circuit reversed the district court's dismissal of Hunt's complaint. Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." Pet. App. 31a.

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's holding that relators can invoke the three-year limitations period in Section 3731(b)(2) where the United States has not intervened in the case is contrary to the statute's language, structure, purpose, and history, and would create a cascade of congressionally unintended consequences.

A. When "read in its proper context," the language of Section 3731(b)(2) demonstrates that this limitations period is not available to relators in the absence of government intervention. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). The language of Section 3731(b)(2) does not include an explicit reference to relators and instead refers only to an "official of the United States." 31 U.S.C. § 3731(b)(2). In addition, this Court has already construed Section 3731(d)—which applies to "any action brought under section 3730," *id.* § 3731(d)—as "limited to § 3730(a)

actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 418. The nearly identical language at the outset of Section 3731(b)(2)—"[a] civil action under section 3730"—should be given the same meaning. In fact, Congress lifted the text of Section 3731(b)(2) from 28 U.S.C. § 2416(c), a tolling provision that applies *only* to claims filed by the United States. The Eleventh Circuit's hyperliteral reading of Section 3731(b)(2)—which began and ended with the conclusion that a non-intervened False Claims Act suit is a type of "civil action under section 3730"—ignores these contextual guideposts.

B. The "default rule[s]" governing statutes of limitations confirm Congress's intent to limit the availability of Section 3731(b)(2) to suits in which the United States is a party. *Graham*, 545 U.S. at 418. Section 3731(b)(2) is a tolling provision that links the start of the limitations period to discovery of the alleged False Claims Act violation. As this Court has recognized—and both common-law rules and state statutes demonstrate—tolling provisions delay the running of the statute of limitations until the "facts are, or should have been, discovered *by the plaintiff*." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) (emphasis added). According to the Eleventh Circuit, however, Section 3731(b)(2) tolls the statute of limitations until the United States government learns of the alleged fraud, even where, as here, the government itself is not a party to the case. The court of appeals did not identify any other example of a tolling rule linked to the knowledge of a nonparty.

C. The Eleventh Circuit's interpretation of Section 3731(b)(2) would also lead to a host of "counterintuitive results" that Congress could not possibly have

intended. *Graham*, 545 U.S. at 421. For example, the Eleventh Circuit's rule would afford relators a *longer* period to sue than the government in some situations where a relator and the government are similarly situated. The Eleventh Circuit's interpretation of Section 3731(b)(2) would also render the six-year limitations period in Section 3731(b)(1) superfluous in virtually all cases in which the United States declines to intervene. In fact, relators would have a strong incentive to delay disclosing fraud to the government and to wait the full ten years to file suit in order to maximize their recovery in cases of ongoing fraud—delaying public exposure of the fraud and the government's eventual financial recovery. In addition, under the Eleventh Circuit's rule, the government would be burdened with extensive discovery about whether and when it learned of the alleged fraud in cases where it made the affirmative decision not to intervene. Interpreting Section 3731(b)(2) as limited to cases in which the United States is a party would avoid all of these irrational outcomes.

D. Finally, the legislative history demonstrates that Congress enacted Section 3731(b)(2) to address concerns about the ability of the government to discover fraud and prepare a complaint within the then-exclusive six-year limitations period. The legislative record does not include any similar expressions of concern about the ability of relators to uncover fraud and file suit in a timely manner. Congress referred exclusively to "the government" in explaining its rationale for Section 3731(b)(2) and was careful to distinguish between the government and relators throughout the legislative record.

Because all of the relevant interpretive guideposts demonstrate that Congress did not intend to make

Section 3731(b)(2) available where the United States declines to intervene—and it is undisputed that Hunt's complaint was filed more than six years after the alleged False Claims Act violations—Hunt's suit is untimely.

II. If the Court nevertheless concludes that Section 3731(b)(2) is available in cases where the United States has not intervened, it should hold that the limitations period in such cases is triggered by the knowledge of the relator, not the government.

Although the "imprecise[ ]" language of Section 3731(b)(2) does not expressly reference relators, *Graham*, 545 U.S. at 418, it is apparent from the statutory context that, when a relator files suit on behalf of the government and the government declines to intervene, the relator is the "official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). In such cases, the United States' "interests [are] represented" by the relator, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009), who brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, as to the portion of the recovery paid to the government, acts as a "statutorily designated agent of the United States," *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *see also Webster's Third New Int'l Dictionary* 1567 (2002) (an official is a "person authorized to act for a government"). Linking the limitations period in Section 3731(b)(2) to the relator's knowledge in non-intervened cases is also consistent with the "default rule," *Graham*, 545 U.S. at 418, that tolling provisions are tied to the knowledge of the plaintiff—not a third party, *Credit Suisse*, 566 U.S. at 227.

By decoupling the start of the limitations period from the relator's knowledge, the Eleventh Circuit's contrary rule would create anomalous circumstances in which the claims of diligent relators would be time-barred but the claims of relators who intentionally waited years to file suit would be timely. Deeming the relator to be the relevant "official of the United States" would avoid those congressionally unintended consequences. It would also mitigate a number of the counterintuitive results that would otherwise flow from making Section 3731(b)(2) available in non-intervened cases by, for example, eliminating the possibility that relators could be treated more favorably than the government in some cases and relieving the government of limitations-related discovery burdens in cases where it has not intervened.

Because it is undisputed that Hunt filed suit more than three years after he learned of the alleged fraud, his suit is time-barred under this alternative interpretation of Section 3731(b)(2).

ARGUMENT

Section 3731(b)(2) of the False Claims Act provides that a "civil action under section 3730 may not be brought more than 3 years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). When "read in its proper context" and in light of the statutory structure, purpose, and history, it is evident that Congress did not intend Section 3731(b)(2) to be available to relators where the United States has not intervened in the case. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S.

409, 415 (2005). At a minimum, the Court should mitigate the "counterintuitive results" of permitting relators to invoke Section 3731(b)(2) by concluding that the three-year limitations period begins to run based on the knowledge of the relator, rather than the knowledge of the United States government, where the United States is not a party to the False Claims Act case. *Id.* at 421. Under either interpretation, the judgment must be reversed.

I. SECTION 3731(B)(2) APPLIES ONLY IN SUITS BROUGHT BY THE UNITED STATES OR IN WHICH THE UNITED STATES INTERVENES.

The three-year limitations period established by Section 3731(b)(2) cannot be invoked by relators where the United States is not a party to the case. The Eleventh Circuit's contrary conclusion rests on an unduly literal reading of Section 3731(b)(2) that ignores the interpretive approach this Court applied in *Graham* when construing this "imprecise[ ]" statutory provision. 545 U.S. at 418.

In *Graham*, the Court held that the six-year statute of limitations in Section 3731(b)(1) does not apply to False Claims Act retaliation claims under Section 3730(h) and that those claims are instead subject to the most analogous state statute of limitations. 545 U.S. at 422. The Court reached this conclusion even though Section 3731(b)(1) applies to a "civil action under section 3730" and thus, by its terms, would appear to encompass retaliation claims under Section 3730(h). Emphasizing that "[s]tatutory language has meaning only in context," the Court construed Section 3731(b) in the context of the broader False Claims Act and with due regard for the necessity of avoiding "counterintuitive results." *Id.* at 415, 421.

The Court began by highlighting that, whereas Section 3731(b)(1) links the start of the limitations period to "the date on which the violation of section 3729 is committed," *Graham*, 545 U.S. at 415 (internal quotation marks omitted), retaliation claims under Section 3730(h) "need not allege that the defendant submitted a false claim" in violation of Section 3729, "leaving the limitations period without a starting point," *id.* at 416. "Applying § 3731(b)(1) to [False Claims Act] retaliation actions" thus "sits uneasily with § 3731(b)(1)'s language, which assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729' certain from which to start the time running." *Id.* (second alteration in original). That "textual anomaly," the Court reasoned, "at a minimum, shows that § 3731(b)(1) is ambiguous about whether 'action under section 3730' means all actions" or simply actions under subsections (a) and (b). *Id.*

To resolve that ambiguity, the Court relied on two interpretive guideposts. First, looking to the other provisions of the False Claims Act, it emphasized that "the very next subsection of the statute"—which is now found in Section 3731(d)—"also uses the similarly unqualified phrase 'action brought under section 3730'" to refer only to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 417–18 (citation omitted). That "implicit limitation of the phrase" showed that "Congress used the term 'action under section 3730' imprecisely in § 3731" and "sometimes used the term to refer only to a subset of § 3730 actions." *Id.* at 418. Accordingly, it was "reasonable to read the same language in § 3731(b)(1) to be likewise limited." *Id.*

Second, the Court relied on the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham*, 545 U.S. at 418. Applying this rule to the "two plausible constructions of [the] statute of limitations," the Court concluded that Section 3731(b)(1) does not apply to retaliation claims because, if it did, the statute of limitations would "begin[ ] to run . . . on the date the actual or suspected [False Claims Act] violation occurred," not on the date of the retaliatory conduct. *Id.* at 419, 421.

The Court further explained that its interpretation of Section 3731(b)(1) would avoid the "counterintuitive results" that would arise from applying the provision to retaliation claims, such as the possibility that a retaliation claim could be "time barred before it ever accrues." *Graham*, 545 U.S. at 421. This consideration confirmed the Court's conclusion that retaliation claims should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1). *Id.* at 422.

Applying *Graham*'s interpretive approach to Section 3731(b)(2)—reading the plain language in light of the statutory context, structure, purpose, and history and with due regard for avoiding counterintuitive results—demonstrates that Section 3731(b)(2) is only available where the United States filed suit or intervened in the action.

A. The Text, Context, And Statutory Antecedents Of Section 3731(b)(2) Establish That It Applies Only To Suits In Which The United States Is A Party.

When read in the broader context of Section 3731 as a whole and viewed in conjunction with its statutory origins, the plain language of Section 3731(b)(2) establishes that the provision is not available to relators where the United States has declined to intervene in a False Claims Act suit.

First, Section 3731(b)(2) does not expressly mention relators. It refers instead to "the official of the United States charged with responsibility to act in the circumstances" and starts the three-year limitations period on the date when that official knew, or should have known, of the alleged fraud. 31 U.S.C. § 3731(b)(2). As discussed in detail below, it is a well-established default rule that statutes of limitations that are tied to the discovery of the underlying violation start to run based on *the plaintiff's* knowledge. *See infra* Part I.B. If Congress had intended to diverge from this settled limitations principle by making Section 3731(b)(2) available to relators where the United States has not intervened and by tying the limitations period to the nonparty government's knowledge, it would have included explicit language to that effect. The absence of any language expressly authorizing relators to invoke Section 3731(b)(2) where the United States is not a party is a strong indication that Congress intended to adhere to the default rule and thus did not intend to make Section 3731(b)(2) available where the government did not file suit or intervene in the action. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate

a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotation marks omitted).

Second, this Court has already held in *Graham* that Congress used the language "action under section 3730" elsewhere in Section 3731 to refer only to suits filed by the United States or in which the United States has intervened. In particular, the Court concluded that Section 3731(d)—which provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence"—is limited to "the types of § 3730 actions in which the United States necessarily participates." 545 U.S. at 418.[2] Despite the broad "any action" language, the Court held that Section 3731(d) is "limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Id.* "Otherwise, the United States would be 'required to prove all essential elements of the cause of action[ ]' . . . in all § 3730 actions, regardless of whether it participated in the action." *Id.* (quoting 31 U.S.C. § 3731(d)).

The fact that Congress used the phrase "any action brought under section 3730" in Section 3731(d) to refer only to suits filed by the United States or in which the United States has intervened is strong textual evidence that Congress used the nearly identical language—"[a] civil action under section 3730"—in

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[2] This provision was found in Section 3731(c) when *Graham* was decided, but was redesignated as Section 3731(d) in 2009. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

Section 3731(b)(2) to apply to the same subset of Section 3730 actions. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted). Indeed, the textual similarities between Section 3731(b)(2) and Section 3731(d) are particularly powerful because both provisions explicitly refer to the "United States."[3]

Third, when Congress enacted Section 3731(b)(2) in 1986, it lifted the statute's text from a tolling provision that applies only to suits brought by the government. Congress copied the text of Section 3731(b)(2) from 28 U.S.C. § 2416(c), which tolls the generally applicable limitations periods in 28 U.S.C. § 2415 for civil claims brought by the United States. Section 2416(c) states that the various limitations periods established by Section 2415 are tolled when "facts material to the right of action are not known and reasonably could not have been known by an official of the United States charged with responsibility to act in the circumstances." 28 U.S.C. § 2416(c). Congress incorporated that same language into Section 3731(b)(2). *See* 132 Cong. Rec. S11,238, S11,244 (Aug. 11, 1986) (statement of Sen. Grassley) ("The committee has added a tolling provision[ ] to the False Claims

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[3] To be sure, when used in Section 3731(b)(1), "[a] civil action under section 3730" does encompass relator-initiated suits in which the United States has not intervened because, unlike with Section 3731(b)(2), the statutory text, structure, purpose, and history provide no indication that Congress intended to exclude those suits from Section 3731(b)(1). The distinction between the reaches of Sections 3731(b)(1) and 3731(b)(2) is simply another example of Congress's "imprecis[ion]" in drafting Section 3731. *Graham*, 545 U.S. at 418.

Act which is adopted directly from 28 U.S.C. 2416(c)."). Section 3731(b)(2)'s "transcription of statutory language supports the conclusion that the text of Section 3731(b)(2) lengthens the [False Claims Act's] limitations period only when the government is a party." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 294 (4th Cir. 2008); *cf. Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("[B]ecause . . . there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration," courts should not impose a limitations rule in RICO suits that "would clash with the limitations imposed on Clayton Act suits.").

The Eleventh Circuit discounted this textual evidence of Congress's intent to limit the availability of Section 3731(b)(2) to suits in which the United States is a party in favor of a single-minded focus on Congress's use of the unqualified language "civil action under section 3730"—which, on its face, "includes § 3730(b) *qui tam* actions when the government declines to intervene"—in Section 3731(b)(2). Pet. App. 14a. But if this Court had applied the Eleventh Circuit's simplistic mode of analysis in *Graham*, it would have begun and ended its statutory interpretation with the fact that a retaliation claim under Section 3730(h) is a type of "civil action under section 3730." The Court rejected that artificially narrow approach in favor of a more comprehensive inquiry that interpreted the relevant language of Section 3731(b)(1) "in its proper context." *Graham*, 545 U.S. at 415.

Graham was no outlier in that regard. The Court, time and again, has endorsed that holistic approach to statutory interpretation and recently reaffirmed that its "duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480,

2489 (2015) (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)); *see also id.* at 2495 ("while the meaning of the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' may seem plain 'when viewed in isolation,' such a reading turns out to be 'untenable in light of [the statute] as a whole'") (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (alterations in original)).

Applying that same mode of interpretation here reveals multiple textual indications that Congress did not intend to make Section 3731(b)(2) available in suits where the United States is not a party.

B. Default Limitations Rules Support Restricting Section 3731(b)(2) To Suits In Which The United States Is A Party.

The textual evidence that Section 3731(b)(2) is not available to relators where the government has not intervened in the case is bolstered by the well-established tolling principles that formed the backdrop for Congress's enactment of Section 3731(b)(2).

This Court emphasized in *Graham* that Section 3731(b) should be read "in keeping with the default rule[s]" that guide how "Congress generally drafts statutes of limitations." 545 U.S. at 418. In *Graham*, those default rules supported the conclusion that Section 3731(b)(1) does not apply to retaliation claims under Section 3730(h) because limitations periods generally "begin when the cause of action accrues" and, if Section 3731(b)(1) were applied to retaliation claims, the limitations period would run from the date of the underlying fraud, rather than from the date of the employer's retaliatory conduct, which is when the retaliation claim accrues. *Id.* The Court therefore declined

to follow the literal language of Section 3731(b)(1)—which is broad enough to encompass retaliation claims—because the result would be inconsistent with the "standard rule" that "the limitations period commences when the plaintiff has a complete and present cause of action." *Id.* (internal quotation marks omitted); *see also Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (default limitations rules control when text does not "clearly indicate[ ] an intent to displace" them).

Here, the relevant default rules confirm that Congress did not intend Section 3731(b)(2) to apply where the United States is not a party to the case. By delaying the start of the limitations period until the discovery of material facts about the alleged fraudulent conduct, Section 3731(b)(2) creates a tolling or "discovery" rule. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010). Tolling rules have long-standing common-law antecedents. *See Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) ("Deeply rooted in our jurisprudence," the principle that "no man may take advantage of his own wrong" "has frequently been employed to bar inequitable reliance on statutes of limitations."). As Congress recognized when enacting Section 2416(c)—the statutory model for Section 3731(b)(2), *see supra* Part I.A—tolling rules also have been codified by many States. *See* S. Rep. No. 89-1328, at 6 (1966) (noting that "[t]his type of exclusion" from the running of a limitations period "is to be found in the law of many States in both fraud and tort limitations").

Many of the state statutes codifying tolling rules explicitly provide that the limitations period begins to run when the party entitled to bring a claim learns about, or should have learned about, the material

facts.[4] Likewise, in applying these common-law and statutory tolling rules, courts have consistently stated that tolling is based on the knowledge and actions of the *plaintiff*, not a third party.[5] As this Court has explained, "[i]t is well established . . . that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases"—and the limitations period begins to run—"when those facts are, or should have been, discovered *by the plaintiff*." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) (emphasis added). This rule ensures that if "a

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[4] *See, e.g.*, Me. Rev. Stat. tit. 14, § 859 ("If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action, except as provided in section 3580."); Mich. Comp. Laws § 600.5855 ("If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.").

[5] *See, e.g.*, *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) ("Under [the discovery rule], accrual is delayed until the plaintiff has discovered his cause of action.") (internal quotation marks omitted); *United States v. CFW Constr. Co.*, 649 F. Supp. 616, 619 (D.S.C. 1986) ("Federal statutes of limitation in fraud cases are universally tolled until the plaintiff knew or should have known of the facts giving rise to its cause of action."); *Hames v. N. Ill. Gas Co.*, 388 N.E.2d 1127, 1128 (Ill. App. Ct. 1979) ("The discovery rule grew out of cases in which the injury was not readily ascertainable and in which justice was accordingly served by permitting a plaintiff to sue within the statutory period as computed from the time he knew or should have known of the right of action.").

plaintiff has been injured by fraud and remains in ignorance of it," he does not lose his right to sue. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (internal quotation marks omitted); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) ("[E]quitable tolling [is] a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'") (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)).

The text of Section 3731(b)(2) reflects these fundamental characteristics of tolling rules: It delays the running of the three-year limitations period until the "official of the United States charged with responsibility to act in the circumstances" knew "or reasonably should have . . . known" the "facts material to the right of action." 31 U.S.C. § 3731(b)(2). It is "in keeping with the default rule[s]" that guide how "Congress generally drafts statutes of limitations," *Graham*, 545 U.S. at 418, to toll the statute of limitations under Section 3731(b)(2) based on the knowledge of the relevant United States official in suits filed by the United States or in which the United States intervenes. But it would be flatly at odds with the background rules embodied in settled common-law tolling principles and modern tolling statutes to permit a relator to invoke Section 3731(b)(2) based on the knowledge of a government official, where the United States itself is not a party to the suit.

The court of appeals was untroubled by the sheer novelty of its ruling because, in its view, "even though the United States is not a party to a non-intervened *qui tam* action," it "remains the real party in interest and retains significant control over the case." Pet.

App. 19a–21a. But despite what the Eleventh Circuit described as the United States' "unique role" in False Claims Act litigation, *id.* at 21a, the fact remains that "[t]he United States . . . is a party to a privately filed [False Claims Act] action *only* if it intervenes." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (emphasis added; internal quotation marks omitted). The Eleventh Circuit cited no case outside of the False Claims Act setting in which a court tied the running of a statute of limitations to the knowledge of a real party in interest who was not also an *actual* party to the case, and no statutory antecedent for a tolling rule based on the knowledge of a non-party. There is no reason to believe that Congress intended to break new legal ground—and depart from settled default tolling principles—when it enacted Section 3731(b)(2).

C. The Eleventh Circuit's Interpretation Of Section 3731(b)(2) Would Lead To Counterintuitive Results.

Authorizing relators to invoke Section 3731(b)(2) where the United States is not a party and tying the limitations period to the knowledge of the United States government would create precisely the type of "counterintuitive results" that the Court sought to avoid in *Graham* when it refused to apply Section 3731(b)(1) to retaliation claims. 545 U.S. at 421.

First, the Eleventh Circuit's rule would lead to the anomalous result that relators would have a longer period to sue than the government in some scenarios where a relator and the government are similarly situated. Under the Eleventh Circuit's rule, if a relator learns about fraudulent activity one day after it occurred, the relator would have a full ten years to file suit, as long as the government did not learn about

the fraud in the interim, because the limitations period in Section 3731(b)(2) would never be triggered. But if the government learns about the fraud the day after it occurred, the government would have only six years to file suit because the limitations period in Section 3731(b)(2) would begin to run immediately and therefore would expire before the close of the six-year limitations period in Section 3731(b)(1).

There is no reason that Congress would have treated a relator more favorably than the government itself in crafting the False Claims Act's statute of limitations. Indeed, the False Claims Act generally affords the government *greater* rights than relators. *See, e.g.*, 31 U.S.C. § 3730(e)(3) (relators cannot bring actions based on "allegations or transactions" at issue in civil or administrative proceedings to which the government is a party); *id.* § 3730(e)(4) (providing for dismissal of suits based on publicly disclosed information unless the relator is an "original source of the information"); *id.* § 3730(b)(1) (relator may not dismiss an action without the government's approval); *id.* § 3730(c)(2)(A) (government may dismiss an action over the relator's objections). And as discussed in Part I.D, *infra*, Congress was acutely aware when enacting Section 3731(b)(2) that the government faced unique difficulties in investigating and prosecuting False Claims Act suits. It would have been irrational for Congress nevertheless to afford relators a *longer* period to sue after discovering fraud than the government.

Second, under the Eleventh Circuit's ruling, the six-year limitations period established in Section 3731(b)(1) would become "superfluous in nearly all" relator-initiated cases in which the United States does not intervene. *Sanders*, 546 F.3d at 295. The six-year

period would apply in non-intervened suits only when the government learned about the fraud within the first three years of its occurrence but then declined to file its own suit. But such cases are likely to be rare. After all, both Section 3731(b)(2) and the *qui tam* provisions of the False Claims Act are premised on the notion that fraud is often difficult for the government to detect. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) ("Congress viewed qui tam prosecutions as providing a means to achieve *rapid* exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities."). And, where the government does detect fraud, it will often bring its own False Claims Act suit against the perpetrator. Thus, in the vast majority of relator-initiated cases, it is the relator—not the government—who discovers the fraud. The Eleventh Circuit's rule means that, in each of those cases, the limitations period in Section 3731(b)(2) will give the relator a longer period to sue—a full ten years from the date of the alleged violation—than Section 3731(b)(1), effectively nullifying one of the two limitations provisions established by Congress. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("it is generally presumed that statutory language is not superfluous").

Third, because the Eleventh Circuit's rule would provide relators with a full ten years to file suit whenever the government did not learn of the fraud, it would create a strong incentive, in cases of ongoing fraud, for relators to decline to disclose the fraud to the government and instead wait the full ten years to file suit. This delay would allow the maximum

amount of damages from the ongoing misconduct to accrue before suit is filed.[6]

It would be absurd to presume, however, that Congress intended to empower relators to "extend the limitations period at will"—and to enhance their ultimate financial recovery—by keeping the government in the dark about fraudulent conduct that is continuing to be perpetrated at the government's expense. *Sanders*, 546 F.3d at 295; *see also Corley v. United States*, 556 U.S. 303, 317 (2009) (reasoning that "the absurdities of literalism . . . show that Congress could not have been writing in a literalistic frame of mind"). In fact, one of the principal purposes of the 1986 amendments to the False Claims Act was to "encourag[e] *prompt* action on the part of relators." *Sikkenga*, 472 F.3d at 725 (emphasis added); *see also* S. Rep. No. 99-345, at 11 (1986) ("'Prosecutions conducted by [relators] compare with [those conducted by the government] as the enterprising privateer does to the slow-going public vessel.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

Congress's interest in encouraging relators to file suit promptly is fundamentally at odds with a limitations rule permitting relators to intentionally delay up to *ten years* before filing suit. *Cf. Rotella*, 528 U.S. at 558–59 ("extend[ing] the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete" would have

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[6] Relators often allege fraudulent activity that spans a number of years. *See, e.g., United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1303 (11th Cir. 2002) (relator alleged "decade-long campaign to defraud the Government"); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 267 (D.D.C. 2002) (relator alleged a "twelve year fraudulent scheme").

"patently disserve[d] the congressional objective of a civil enforcement scheme . . . aimed at rewarding the swift who undertake litigation in the public good"). Not only would the delay create the possibility that the fraudulent conduct would continue at least until suit is filed, but even where the fraud did not continue, the government would be prejudiced by the relator's delay because any potential recovery would be postponed. The government could also lose the ability to file a criminal fraud suit against the perpetrator within the applicable five-year statute of limitations. *See* 18 U.S.C. §§ 287, 3282.

In addition, allowing relators to delay would undercut the overarching goal of the False Claims Act in general—and the 1986 amendments in particular—of "enhanc[ing] the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99–345, at 1. Relators could wait to sue "until evidence has been lost, memories have faded, and witnesses have disappeared," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (internal quotation marks omitted), reducing or eliminating the government's chances of recovery. Alternatively, relators could purposefully preserve their own evidence in the years before filing suit, while the defendant—who would lack notice of the impending suit—would have little reason to take similar steps, leaving the relator with the type of unfair evidentiary advantage that statutes of limitations are designed to foreclose. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 473 (1975) ("Statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise.").

The Eleventh Circuit deemed it unlikely that relators would delay filing suit for up to ten years in an effort to maximize their recovery because the False Claims Act gives relators incentives to sue promptly, such as the risk that the relator would lose the right to sue at all if another relator sued or the fraud became public. Pet. App. 23a–24a. But these incentives would have little effect whenever a relator knew that only a small number of other persons were aware of the fraud. Indeed, those incentives had no impact in this case, where Hunt waited seven years after he learned of the alleged fraud to file suit. And Hunt is not alone in his dilatory approach. There are many other examples of False Claims Act cases that were filed by relators years after they learned of the alleged violation.[7]

The Eleventh Circuit also emphasized that a relator's recovery may be reduced if the relator delays in filing suit, Pet. App. 24a, but delay was not among the factors Congress originally contemplated would reduce a relator's recovery. *See* S. Rep. No. 99–345, at 28 (listing as factors for determination of recovery percentage: "(A) the significance of the information provided to the Government; (B) the contribution of the person bringing the action to the results obtained; and (C) whether the information which formed the basis for the suit was known to the Government"). It was not until 1996 that delayed disclosure first appeared in Department of Justice guidelines as a relevant factor for determining a relator's share of the recovery.

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[7] *See, e.g.*, *United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x 270, 273 (3d Cir. 2003) (nine and a half years after learning of the fraud); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996) (seven years after learning of the fraud).

See Dep't of Justice Guidelines, The False Claims Act: Fraud Against the Government § 8:4; *see also United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 83–84 (D.D.C. 2012) ("In December of 1996, the Department of Justice issued a set of 'Relator's Share Guidelines.'"). The possibility that a reduced award would deter delay by relators therefore could not have informed Congress's decision-making about whether to make Section 3731(b)(2) available to relators where the United States has not intervened.

Finally, the Eleventh Circuit's interpretation of Section 3731(b)(2) would require discovery into the government's knowledge even when it declined to intervene in a relator's suit, which would "cause innumerable headaches for both defendants and the government during discovery." *Sanders*, 546 F.3d at 295. The practical difficulties of establishing the government's knowledge when it is not a party to the case are manifest. Relators and defendants seeking to determine whether a claim was timely would need to discover: (1) what the government knew about the alleged fraud and when it first came to know the "facts material to the right of action"; (2) if the government did not know about the alleged fraud or learned about it only well after it occurred, when the government "reasonably should" have learned about the fraud; and (3) which "official of the United States" was "charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). The Eleventh Circuit made clear that it anticipated precisely this type of discovery to resolve the statute-of-limitations issue in this litigation. *See* Pet. App. 31a n.12 ("if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt's claims could still be barred by the statute of limitations").

Each of these inquiries would require burdensome and time-consuming investigation, which could be exacerbated depending on the nature of the alleged fraud and the number and size of the agencies involved. As the Court has emphasized, "[d]etermining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts" because "[a]gencies often have hundreds of employees, dozens of offices, and several levels of leadership." *Gabelli v. SEC*, 568 U.S. 442, 452 (2013). Determining when the government "reasonably should" have known of the alleged fraud can be especially challenging because the "'reasonableness'" requirement entails "a complex factual determination." *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 863 (10th Cir. 1993). Those burdens would be compounded in many cases by uncertainty about the identity of the "official of the United States charged with responsibility to act in the circumstances," an issue that itself has been a source of confusion and disagreement among the lower courts. *Compare United States v. Macomb Contracting Corp.*, 763 F. Supp. 272, 274 (M.D. Tenn. 1990) (holding that the Assistant Attorney General in charge of the Civil Division is the only government official whose knowledge would trigger the three-year limitations period), *with United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 777 F. Supp. 195, 204–05 (N.D.N.Y. 1991) (holding that knowledge of senior army officials in charge of the project at issue was sufficient to trigger the three-year limitations period).

These inquiries would necessitate discovery into who knew what, and when, within various branches of government and subject the government to "disruption and expense in responding to discovery requests in actions in which the government affirmatively

chose to avoid those concerns by declining to intervene." *Sanders*, 546 F.3d at 295. There is no reason to believe that Congress would have wanted to impose these burdens on the government in cases in which it decided not to participate—a decision that is itself often motivated by the government's resource constraints. *See* Victor A. Razon, *Replacing the SEC's Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement*, 47 Pub. Cont. L.J. 335, 349 (2018) ("[A]ccording to an empirical analysis of the DoJ's intervention decisions between 1986 and 2011, non-merit based factors—including resource constraints and the defendant's identity—significantly contributed to DoJ decisions to not intervene in *qui tam* cases.").

According to the Eleventh Circuit, these concerns are "overstated" because "government knowledge may be relevant to the merits of the relator's [False Claims Act] claim even in a non-intervened *qui tam* action" with respect to issues of materiality and scienter. Pet. App. 22a n.10. To be sure, government knowledge "*may be*" relevant to materiality and scienter in *some* False Claims Act cases. But materiality is principally an objective inquiry, *see Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016), and scienter typically turns solely on the defendant's state of mind (although both elements can be negated by government knowledge in some cases, *see id.* (materiality); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) (scienter)). In contrast, the government's knowledge of the alleged fraud is *always* relevant to the trigger date for Section 3731(b)(2)'s limitations period under the Eleventh Circuit's interpretation of the statute. The practical burdens that the

Eleventh Circuit's approach would impose on the government therefore dwarf those hypothesized by the Eleventh Circuit.

Any of these counterintuitive results would be sufficient, standing alone, to call into question whether Section 3731(b)(2) should be given the literalistic interpretation adopted by the Eleventh Circuit. Taken together, they leave no doubt that Congress could not have intended to authorize relators to invoke Section 3731(b)(2) where the United States has not intervened in the suit. *See Graham*, 545 U.S. at 421; *see also King*, 135 S. Ct. at 2494 (rejecting literal interpretation of statute where it was "implausible that Congress meant the Act to operate in [that] manner").

D. The Legislative History Confirms That Section 3731(b)(2) Is Only Available In Suits In Which The United States Is A Party.

The legislative history to the 1986 False Claims Act amendments provides further confirmation that Congress intended to limit the availability of Section 3731(b)(2) to suits filed by the United States or in which it intervenes.

1. Congress enacted Section 3731(b)(2) in 1986 to address a specific problem particular to the False Claims Act: the absence of a provision that would extend the government's time to file suit based on the time it took the government to discover the fraudulent conduct. The tolling provision in 28 U.S.C. § 2416(c)—which tolls the generally applicable limitations periods in 28 U.S.C. § 2415 where "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"—

was inapplicable by its terms to the False Claims Act's statute of limitations in Section 3731. And courts had held that the United States could not rely on non-statutory equitable-tolling principles in False Claims Act cases. *See United States v. Dawes*, 151 F.2d 639, 643 (7th Cir. 1945) (tolling does not apply to the False Claims Act's statute of limitations); *United States v. Borin*, 209 F.2d 145, 147–48 (5th Cir. 1954) (same).

Congress's concern about this "problem" is apparent throughout the legislative record, which makes clear that Congress enacted Section 3731(b)(2) because "the False Claims Act . . . has its own statute of limitations and is not subject to the general provision," *i.e.*, 28 U.S.C. § 2415, and its associated tolling rules. *Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Assistant Attorney General Richard K. Willard). The Department of Justice was particularly concerned about the lack of a tolling rule in False Claims Act cases because, as Assistant Attorney General Richard K. Willard explained, the government "frequently [saw] requests to sue come in right on the brink of the statute of limitations, and sometimes beyond," causing it to "miss out" on claims "because it ha[d] just taken that long to discover the fraud and get a case ready to pursue." *Id.* The Department of Justice sought the enactment of Section 3731(b)(2) because "[t]his amendment would give us a little more flexibility in bringing some cases that otherwise would be barred." *Id.* Indeed, as the accompanying House Report recognized, fraud against the government is "by nature . . . difficult" for the government "to piece together." H.R. Rep. No. 99-660, at 26 (1986); *see also id.* at 25 (noting that "fraud is often difficult to detect" and the government might not become "aware of the fraud" during

the six-year limitations period). Section 3731(b)(2) was therefore necessary to "ensure the Government's rights are not lost through a wrongdoer's successful deception." S. Rep. No. 99-345, at 15.

When adopting Section 3731(b)(2), Congress did not express any similar concerns about relators' inability to discover and investigate fraud within the existing six-year limitations period. On the contrary, the legislative history confirms that Congress considered relators to be well-positioned to discover fraud when it is still ongoing and to act quickly in response. Congress recognized that, although "[d]etecting fraud is usually very difficult" for the government, relators tend to be "close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4; *see also United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) ("One theme recurring through the legislative history" to the 1986 amendments is the intent to encourage those with "first-hand knowledge" of fraudulent conduct to report it.).

2. Not only did government-specific considerations provide the sole impetus for Section 3731(b)(2), but Congress also consistently referred to "the government" when discussing that amendment, without once mentioning relators.

The Senate Report explained that the new subsection modified the False Claims Act's statute of limitations "to permit *the Government* to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when the Government learned of a violation, whichever is later." S. Rep. No. 99-345, at 15 (emphasis added). And the House Report recognized that "the statute of limita-

tions should not preclude *the Government* from bringing a cause of action under this Act if they were not aware of the fraud," while emphasizing that a ten-year statute of repose was also necessary because the Committee "did not intend to allow *the Government* to bring fraud actions [ad infinitum]." H.R. Rep. No. 99-660, at 25 (emphases added).

The bill's principal sponsor in the House of Representatives, Congressman Fish, similarly explained that the amendment "modifies the statute of limitations to permit *the government* to bring an action within six years of when the false claim is submitted . . . or within three years after *the government* learns of the violation, whichever date is later." *Hearing*, *supra*, at 101, 108 (emphases added).

Congress carefully distinguished between the government and relators throughout the legislative history, adding weight to its singular focus on the government when discussing Section 3731(b)(2). For example, the House Report explained that the House version of the bill "expands the role of the *relator* so that when *the Government* enters an action filed by a relator, the relator remains a party to the suit." H.R. Rep. No. 99-660, at 24 (emphases added). The Report also explained that the bill placed limits on "discovery conducted by the *relator*" because of "concerns" that it could "interfere with discovery being conducted by *the Government*." *Id.* (emphases added).

Accordingly, Congress's references to, and distinctions between, the "government" and "relators" in the legislative history were purposeful and meaningful. And nothing in that history indicates that, when Congress added Section 3731(b)(2) "to permit the Government to bring an action . . . within 3 years of when the Government learned of a violation," S. Rep. No. 99-

345, at 15, it intended to extend that authorization to relators.

* * *

In sum, the Eleventh Circuit's interpretation of Section 3731(b)(2) is impossible to reconcile with the interpretive analysis that this Court applied to the same provision of the False Claims Act in *Graham*. According to the Eleventh Circuit, because Section 3731(b)'s prefatory language refers to "[a] civil action under section 3730," each of the following subsections must necessarily apply to *all* actions under Section 3730. *Graham* forecloses this simplistic reading of Section 3731(b)(2). When the phrase "[a] civil action under Section 3730" is read in context and against the backdrop of its statutory antecedents, default limitations rules, and the False Claims Act's purpose and history, as well as this Court's obligation to avoid counterintuitive results, it becomes apparent that Section 3731(b)(2), like Section 3731(d), is "limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 418.

Accordingly, in light of the government's decision not to intervene in this case, Section 3731(b)(2) is unavailable to Hunt. He was therefore required under Section 3731(b)(1) to file suit within six years of the alleged False Claims Act violations. Because Hunt waited to file suit until November 2013—more than six years after the alleged violations ended in "early 2007," J.A. 44—his suit is time-barred.

II. If Section 3731(b)(2) Applies Where The United States Is Not A Party, Then Relators Are "Official[s] Of The United States" Who Must Sue Within Three Years Of Discovering The Fraud.

If the Court decides that relators are permitted to invoke Section 3731(b)(2) where the United States has not intervened in the litigation, it should conclude that, in such cases, the relator is "the official of the United States charged with responsibility to act in the circumstances" and whose knowledge triggers the start of the three-year limitations period. Although Section 3731(b)(2) does not expressly reference relators—a further reflection of Congress's "imprecis[ion]" when drafting that provision—this interpretation is compelled by the broader statutory context in which the provision must be read. *Graham*, 545 U.S. at 415, 418.

Where a relator has filed a False Claims Act suit and the United States has declined to intervene, the statutory context demonstrates that the relator is the "official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). In such cases, the United States' "interests [are] represented" by the relator, *Eisenstein*, 556 U.S. at 934–35, who investigates and sues perpetrators of fraud against the government. A relator brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, with respect to the portion of the recovery that is paid to the government, acts as a "statutorily designated agent of the United States," *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *see also* 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action

shall have the right to conduct the action."). Because the False Claims Act "deputizes private individuals to act to protect the interests of the United States" and to stand in the shoes of the United States, *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 n.8 (9th Cir. 1996), relators are the officials "charged with responsibility to act" on behalf of the United States where the government itself has declined to intervene, 31 U.S.C. § 3731(b)(2); *see also Liberty Mut. Fire Ins. Co. v. EZ-FLO Int'l, Inc.*, 877 F.3d 1081, 1085 (9th Cir. 2017) ("[T]he dynamic in which one party figuratively stands in the shoes of another is . . . a defining feature of *ex rel.* suits.").

Deeming the relator to be the relevant "official of the United States" where the government does not intervene is consistent with common usage of the term "official," which, in the appropriate context, is sufficiently broad to encompass a private "person authorized to act for a government." *Webster's Third New Int'l Dictionary* 1567 (2002).[8] Indeed, Congress has expressly defined "public official" in other contexts to include a "person acting for or on behalf of the United States, . . . under or by authority of" the government. 18 U.S.C. § 201(a)(1); *see also Dixson v. United States*, 465 U.S. 482, 499 (1984) (holding that officers of a private corporation administering federal community-

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[8] *See also Black's Law Dictionary* 1259 (10th ed. 2014) (defining "official" to include "a person . . . appointed to carry out some portion of a government's sovereign powers"); *MerriamWebster Dictionary* (defining "official" as "one who . . . is invested . . . with an office"), https://www.merriam-webster.com/dictionary/official (last visited Dec. 28, 2018); *Google Dictionary* (defining "official" as including a "person . . . having official duties, especially as a representative of an organization or government department"), https://tinyurl.com/ydcbn24x (last visited Dec. 28, 2018).

development block grants were "public officials" because they possessed a "degree of official responsibility for carrying out a federal program or policy"). Where the government declines to intervene in a False Claims Act case to represent its own interests, it is the relator who is "authorized to act for [the] government"—or, in the words of Section 3731(b)(2), who is "charged with responsibility to act in the circumstances"—by pursuing the suit on the government's behalf.

This interpretation of Section 3731(b)(2) also gives effect to the "default rule[s]" for how "Congress generally drafts statutes of limitations." *Graham*, 545 U.S. at 418. As discussed above, one of those default rules is that tolling provisions are triggered based on the knowledge of the plaintiff himself, not based on the knowledge of a nonparty to the litigation. *See Credit Suisse*, 566 U.S. at 227 ("when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff"); *see also supra* Part I.B. Interpreting the limitations period in Section 3731(b)(2) to run based on the knowledge of the relator—rather than based on the knowledge of the United States government—where the United States has declined to intervene gives effect to these settled limitations principles that formed the backdrop for Congress's enactment of Section 3731(b)(2).

In addition, this interpretation comports with the purposes animating tolling rules. The rationale behind tolling is that the limitations period should not begin to run until the "facts are, or should have been, discovered by the plaintiff," where the plaintiff "remains in ignorance of [the fraud] without any fault or want of diligence or care on his part." *Credit Suisse*,

566 U.S. at 227 (internal quotation marks and emphasis omitted). Triggering the limitations period in Section 3731(b)(2) based on the relator's knowledge where the United States has not intervened is consistent with those purposes because it affords the relator additional time to file suit where, through no fault of his own, the relator is unaware of the alleged fraud. It would make no sense, however, to continue to hold the statute of limitations in abeyance after the relator learns, or should have learned, of the alleged fraud simply because the government has not also learned of the fraud. Tolling rules are not intended to assist plaintiffs who learn about the alleged fraud but elect to "sleep on [their] rights" and then bring "stale claims" years after the discovery. *Hyatt*, 91 F.3d at 1217.

Under the Eleventh Circuit's decision, however, the timeliness of a relator's suit would not depend on the factors relevant under default tolling principles—the plaintiff's knowledge and diligence—but on whether and when the government learned of the fraud. The Eleventh Circuit's rule would thus entirely sever Section 3731(b)(2) from "the standard rule[s]" of tolling that presumptively informed Congress's enactment of that provision. *Graham*, 545 U.S. at 418 (internal quotation marks omitted).[9]

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[9] Moreover, the Court has analogized relators to assignees of government claims. *See Vt. Agency of Nat. Res.*, 529 U.S. at 773. Cases applying state-law tolling rules deem the knowledge of an assignee who files suit on the basis of an assigned claim to be relevant for tolling purposes. *See Bierman v. Int'l Bus. Machs. Corp.*, 547 F. App'x 851, 852 (9th Cir. 2013) (plaintiff's claim was time-barred under California law where the plaintiff failed to prove that both he and his assignors "lacked the knowledge necessary to discover his cause of action"); *Silva v. Allstate Ins. Co.*,

In so doing, the Eleventh Circuit's interpretation would create highly anomalous results. For example, it would penalize diligent relators and benefit those relators who affirmatively elect to withhold information from the government in order to augment the size of their potential recovery. Under the Eleventh Circuit's rule, a relator who learned about the alleged fraud the day after it occurred, withheld that information from the government, and then filed suit one day before the ten-year deadline set by Section 3731(b)(2) would have a timely claim (as long as the government did not learn of the fraud in the interim).

Contrast that with a scenario in which the government learned about the alleged fraud the day after it occurred but decided not to file suit due to resource constraints, and the relator then learned about the fraud seven years later and promptly filed suit. That claim would be time-barred under the Eleventh Circuit's rule because it was filed more than six years after the violation and more than three years after the government learned of the fraud. *See, e.g.*, *Kreindler & Kreindler*, 777 F. Supp. at 205 (ruling that a claim was time-barred under both Sections 3731(b)(1) and 3731(b)(2) where the United States learned of the alleged fraud eight years before suit was filed but the

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304 F. App'x 609, 611 (9th Cir. 2008) (holding that an assignee was not entitled to tolling under Hawaii law because he "was aware of the nature of his injuries and failed to pursue his right diligently"); *CitiMortgage, Inc. v. Parille*, 49 N.E.3d 869, 883 (Ill. App. Ct. 2016) (same under Illinois law); *SBAM Partners v. Oh*, No. B168187, 2004 WL 2580424, at *5 (Cal. Ct. App. Nov. 12, 2004) (plaintiff had the "burden to plead specific facts showing that both it and its assignor had an inability to discover the [basis for a cause of action] with the exercise of reasonable diligence").

relator may have learned of the fraud less than three years before suit was filed).

If the relator is deemed to be the relevant "official of the United States" whose knowledge starts the limitations period, however, then the suit filed by the relator in year seven promptly after discovery of the fraud would be timely and the suit filed by the relator who delayed for ten years would be time-barred. There is no reason why Congress would have intended Section 3731(b)(2) to reward relators who withhold information from the government and sit on their rights for up to a decade, and simultaneously bar diligent relators from the courthouse. The Court should not countenance an outcome that is so "difficult to fathom." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989).

In addition, deeming the relator to be the relevant "official of the United States" would mitigate a number of the counterintuitive results that would otherwise arise from authorizing relators to invoke Section 3731(b)(2) where the United States has not intervened. *See supra* Part I.C. For example, the relator would no longer have more time to sue than the government in some factual settings where they are similarly situated. Linking the limitations period to the relator's knowledge in cases where the government is not a party—and to the government's knowledge where it is a party—would mean that the relevant statute of limitations would be six years whether the relator or the government learned about the alleged fraud on the day after it occurred and subsequently filed suit. But, under the Eleventh Circuit's rule, a relator would have longer to sue than the government because the relator's discovery of the fraud would not trigger the limitations period in Section 3731(b)(2).

The relator could therefore wait a full ten years after discovery to file suit (as long as the government was kept in the dark about the fraud)—even though the government itself would have only six years from discovery to file.

Deeming the relator to be the relevant "official of the United States" in non-intervened actions would also address the concerns about rendering Section 3731(b)(1) largely superfluous in cases in which the United States is not a party. Section 3731(b)(1) would be a more favorable statute of limitations for relators whenever they learned about the fraud within three years of its occurrence. Under the Eleventh Circuit's rule, however, Section 3731(b)(1) would be superfluous in non-intervened suits as long as the government did not learn of the alleged fraud within three years of its occurrence. As Congress recognized when enacting the 1986 False Claims Act amendments, it is far more likely that a private party, rather than the government, will discover fraud soon after it is perpetrated against the government. *See* S. Rep. No. 99-345, at 4 ("[d]etecting fraud is usually very difficult" for the government, whereas relators tend to be "close observers or otherwise involved in the fraudulent activity").

Finally, treating the relator as the relevant "official of the United States" would eliminate the discovery burdens on the United States in cases where it has made the affirmative decision not to intervene. Because the limitations period in Section 3731(b)(2) would start to run based on the knowledge of the relator, rather than the knowledge of the government, resolution of a statute-of-limitations defense would not necessitate discovery into the government's knowledge about the alleged fraud where the United States is not a party to the suit.

* * *

If this Court concludes that Congress intended to make Section 3731(b)(2) available to relators where the United States is not a party to the case, the statutory context, structure, and purpose demonstrate that the relator is the "official of the United States charged with responsibility to act in [those] circumstances." 31 U.S.C. § 3731(b)(2). Because it is undisputed that Hunt knew about the alleged fraud in this case more than three years before he filed suit, Pet. App. 34a—and because he filed suit more than six years after the alleged violations—his suit is time-barred under both Sections 3731(b)(1) and 3731(b)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY ADDENDUM

False Claims Act

31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material

to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

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[1] So in original. Probably should be "101–410".

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the

complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court

determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclu-

sion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

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[2] So in original. Probably should be "General".

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Govern-

ment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2)[3] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

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[3] So in original. Probably should be "(ii)".

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[4] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or

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[4] So in original. Probably should be preceded by "section".

attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

31 U.S.C. § 3733. Civil investigative demands

(a) In General.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy

was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act[5] investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

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[5] So in original. Probably should be "law".

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such stand-

ards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial juris-diction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person

that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the

production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth

with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator

shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for ex-amination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice

of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set

aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last

pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery

was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits,

or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC.
and THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA
ex rel. BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The question presented is whether a relator in a False Claims Act *qui tam* action, representing the United States as the real party in interest, may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible Government official's knowledge of the alleged false claim.

PARTIES TO THE PROCEEDING BELOW & RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Respondent Billy Joe Hunt is an individual without any corporate status.

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OPINIONS BELOW

The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing the petition for a writ of certiorari until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

(b) A civil action under *section 3730* may not be brought—

(1) more than 6 years after the date on which the violation of *section 3729* is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after

> the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729–3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

INTRODUCTION

Congress enacted the False Claims Act ("FCA") 150 years ago with one central objective: Stopping procurement fraud and reclaiming ill-gotten gains for the public fisc. Indispensable to the FCA is the relator: A watchdog, informer, investigator, and prosecution partner in achieving that goal. Incentivized by a share of the recovery, the relator can ferret out wrongdoing when the Government's investigatory and prosecutorial resources are insufficient to the task.

For the FCA to work the way Congress intended, the same statute of limitations must apply to the Act's private and public partners. And that is how the law is written. Petitioners would vitiate this symmetry by having private party claims governed by a shorter statute of limitations than government-brought claims—an outcome unsupported by the text of the statute and contrary to the FCA's policy of maximizing the recovery of stolen public funds.

Prior to 1986, the FCA had a six-year statute of limitations, which applied to all parties, both the

Government and relators. 31 U.S.C. § 3731(b)(1). In 1986, Congress extended the statute of limitations up to ten years in situations where the Government learned (or should have learned) of a potential claim, so long as it acted within three years of that knowledge. The expanded limitations period was specifically designed to attack concealed fraud, and can work to defendants' benefit if no claim is brought within the three years following the fraud's discovery.

Petitioners would take away this discovery rule from relators by reconstruing § 3730(b)(2) as applying only to the Government. This Court should reject Petitioners' statutory redrafting and give effect to Congress's words as written. Not only do Petitioners propose their own statutory amendments, they invent a new interpretive canon—the doctrine of "counterintuitive results"—for statutory results that while not absurd, are potentially unfavorable to them. Petitioners decry often far-fetched hypothetical outcomes that are bad for fraudulent actors, but not counter to the FCA. Meanwhile, Petitioners' reading of the Act would render provisions meaningless or incompatible and would elevate legislative history above statutory text, while turning statute of limitations default rules on their head.

In short, Petitioners advance an untenable interpretation of the FCA that creates a two-tier system with the Government and relator claims subject to different statutes of limitations. The FCA's literal text,

however, puts relators and the Government on equal footing when it comes to bringing suit.

STATEMENT OF THE CASE

A. The History and Purpose of the False Claims Act.

The FCA is the Government's most powerful weapon against fraud. Since its enactment more than 150 years ago, it has been used to stop "massive frauds" perpetrated by Government contractors. *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal citation and quotations omitted). With the Act's 1863 creation,[1] Congress "impos[ed] civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment." *Id.* Recognizing that the executive branch's investigative and enforcement arms are not equipped to discover and redress every instance of procurement fraud, Congress created a statutory scheme that provided three primary avenues of litigation: Government-initiated actions, intervened relator-initiated actions, and declined relator-initiated actions. *Vt. Agency of*

[1] As the Court has observed, and as pertains to this case, "Wars have often provided exceptional opportunities for fraud on the United States Government." *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (internal citations and quotations omitted). President Lincoln signed the FCA into law "to combat rampant fraud in Civil War defense contracts." *Id.*

Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 (2000) (citing 31 U.S.C. § 3730(a)–(b), and describing these three actions).

1. Rights of Parties to Relator-Initiated Actions.

If the Government chooses to intervene in the relator-initiated type of FCA suit, "it assumes primary responsibility for prosecuting the action," *Vt. Agency*, 529 U.S. at 769 (describing § 3730(c)(1)), and gains particular procedural accommodations and devices, *see* 31 U.S.C. § 3731(c) (describing filing- and amendment-related procedures for intervened relator-initiated actions). The relator likewise gains particular rights and procedural protections: Congress directed that the relator "shall have the right to continue as a party to the action," § 3730(c)(1), subject to a limited number of actions the Government may take to control the lawsuit or the relator's participation in proceedings. *See* § 3730(c)(2)(A)–(B) (giving the relator the right to receive notice and hearing before the Government dismisses the case, and mandating judicial determination of reasonableness before settlement for all intervened relator-initiated FCA suits); § 3730(c)(2)(C) (providing four limitations a court may impose to restrict relators' participation in intervened actions).

However, if the Government chooses *not* to intervene—the last type of FCA lawsuit—the relator then has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only

on a showing of "good cause," § 3730(c)(3). *See also Vt. Agency*, 529 U.S. at 769. Regardless of the Government's intervention decision, the False Claims Act gives its *qui tam* relators the same status as if the Government itself had brought the suit. *Id.* at 772–74. The United States remains the real party in interest, however, even when it opts not to intervene. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009); *see also* 31 U.S.C. § 3729(b)(1).

Congress further stimulated relator-driven suits through a number of incentives provided in the FCA's text. Relators are encouraged to come forward by statutory provisions granting them fifteen to twenty-five percent of the recovery in intervened cases, § 3730(d)(1), and twenty-five to thirty percent of the recovery in declined cases, § 3730(d)(2). These recoveries are substantial and "essentially punitive in nature": the Act provides for treble damages, plus civil penalties of $11,181 to $22,363 per false claim submitted. *Escobar*, 138 S. Ct. at 1996 (quoting *Vt. Agency*, 529 U.S. at 784); 31 U.S.C. § 3729; 15 C.F.R. § 6.3(3) (2018) (adjusting penalties for inflation). "[T]he relator's bounty is simply the fee he receives out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government." *Vt. Agency*, 529 U.S. at 772 (citing 31 U.S.C. § 3730(b)).

The Act was carefully designed to screen relators to ensure that they are providing novel information that meaningfully aids the Government in prosecuting and remedying fraud without unduly burdening defendants. A relator must be an "original source" of the

information contained in the fraud allegations. In that role, the relator must have either "voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based" prior to public disclosure of such information or possessed "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action[.]" § 3730(e)(4)(B). Relators are also subject to a public disclosure bar, under which courts must dismiss actions based on allegations disclosed in prior Government lawsuits, hearings, investigations, or in the media. § 3730(e)(4)(A). Finally, relators are constrained by the first-to-file bar, which ensures that only the first relator to file a lawsuit on the basis of a particular set of fraud allegations may proceed with an FCA action and share in any recovery. § 3730(b)(5). Taken together, the statutory incentives and bars encourage a race to the courthouse by the relator possessing the best knowledge of the fraud and the greatest capacity to aid the Government in recovering fraudsters' ill-gotten gains, while preventing opportunistic lawsuits and shielding defendants from redundant litigation.

2. Amendments to the FCA.

The amendment history of the False Claims Act demonstrates the crucial role of relators in exposing and prosecuting fraud. The FCA was originally passed in 1863 to combat Civil War procurement fraud, *see*

Escobar, 136 S. Ct. at 1996 (citing *United States v. Bornstein*, 423 U.S. 303, 309 (1976)).

Intervening amendments designed to restrict *qui tam* lawsuits, *see* 31 U.S.C. § 232(C) (1946), proved disastrous, enabling rampant fraud and thus eviscerating Congress's longstanding design for the FCA. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 343 (1989) (describing the "period of desuetude" in which the FCA *qui tam* languished before 1986). For example, the Senate found that in 1985 alone, "45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses," and cited Department of Justice estimates that fraud against the Government represented one to ten percent of the total federal budget. S. Rep. No. 99-345, at 2–3 (1986). Rather than abandoning the *qui tam* to the dustbin of history, Congress acted decisively to reenlist the relator as one of the Government's tools against such sophisticated frauds.

The 1986 amendments reinvigorated the False Claims Act's *qui tam* provisions. Among a suite of changes empowering relators and expanding the reach of FCA liability, Congress intentionally extended the statute of limitations. Previously, the Act had provided a flat, six-year statute of limitations. However, in 1986, Congress added a discovery rule, *see* 31 U.S.C. § 3731(b) (1988), providing that an FCA action may also be brought no "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the

circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). Congress also lowered the burden of proof, 31 U.S.C. § 3731(c) (1988); removed the specific intent requirement, 31 U.S.C. § 3729(b) (1988); increased the incentive available to relators from twenty-five to thirty percent of the recovery, 31 U.S.C. § 3730(d)(2) (1988); and established the *qui tam* procedures now codified in 31 U.S.C. § 3730(b)–(c), enabling relators to bring FCA suits—and continue those suits even after the Government declines to intervene. *See, e.g.*, § 3730(c)(2)(D)(3) (1988).

Congress further amended the False Claims Act in 2009, reinforcing the provisions and aims of the 1986 amendments. Charles Doyle, Cong. Research Serv., R40785, Qui Tam: The False Claims Act and Related Federal Statutes 8 (2009), available at https://fas.org/sgp/crs/misc/R40785.pdf ("The amendments of the Fraud Enforcement and Recovery Act of 2009 reinforced the 1986 amendments, particularly in instances where judicial developments evidenced a need for clarification.").

B. The Parsons-Cochise Bid-Rigging & Bribery Scheme.

Petitioner, The Parsons Corporation ("Parsons"), is an engineering, construction, technical, and management firm that provided services under contracts with the United States Government during the Iraq and Afghanistan wars. Pet'rs' Br. J.A. 26a ¶ 20, 19a–21a. At

issue here was the $60 million U.S. Army Corps of Engineers Parsons Prime Contract for Coalition Munitions Clearance ("CMC Contract"), Pet'rs' J.A. 33a–34a ¶ 47, by which the Government arranged for cleanup of excess munitions discarded by enemy troops. Pet'rs' J.A. 24a–25a, 26a ¶ 20; Pet. App. 3a. Parsons solicited and received multiple subcontract bids in response to its February 4, 2006 Request for Quote ("RFQ"). Pet'rs' J.A. 35a ¶¶ 55–57. Petitioner Cochise Consultancy, Inc. ("Cochise"), Pet'rs' J.A. 26a ¶ 22, was not among the security services subcontractors eligible to participate in bidding for that RFQ. Pet'rs' J.A. 36a, ¶¶ 60–61. In spite of its non-inclusion in the bidding pool (due to Cochise's failure to provide proof of insurance, Pet'rs' J.A. 36a ¶ 60), Cochise was named as subcontractor for CMC Contract security services on February 21, 2006. Pet'rs' J.A. 27a ¶ 26, 35a ¶ 54 (Parson's Task Order, "Cochise Subcontract"); Pet. App. 4a–5a (describing alleged bid-ridding scheme); *accord* Pet'rs' J.A. 36a–40a (factual allegations in support of bid-rigging scheme).

Respondent Billy Joe Hunt is a former Parsons employee who managed the CMC Contract's day-to-day operations in Iraq. Pet'rs' J.A. 24a–25a ¶ 17; Pet. App. 3a. His complaint, Pet'rs' J.A. 6a–47a, alleges that Parsons and Cochise engaged in a bid-rigging and bribery scheme that charged the Government for security services on the CMC Contract at grossly inflated rates, including charges for services that were not provided at all. Pet. App. 3a–5a; *see also* Pet'rs' J.A. 19a–22a

¶¶ 1–9, 38a ¶ 72 (describing one instance of non-performance involving a vehicle paid for but not received).

Cochise remained the subcontractor until the end of September 2006, Pet'rs' J.A. 40a ¶ 80; *accord* Pet. App. 5a, when bidding was reopened and the CMC security subcontract was awarded to another company, ArmorGroup. Pet. App. 5a; Pet'rs' J.A. 27a ¶ 25.

Indeed, ArmorGroup initially won the subcontract through the February 2006 RFQ process. Pet. App. 3a, 5a; Pet'rs' J.A. 27a ¶ 25. Cochise, however, circumvented that bidding process through inducements and bribes, including at least one expense-paid trip, Pet'rs' J.A. 20a–21a ¶ 4, that allegedly operated as an illegal gratuity. *Id.*; *see also* Pet'rs' J.A. 35a–38a (describing subtleties of the scheme).

Cochise allegedly directed its agents to persuade an Army Corps of Engineers Officer, Wayne Shaw, to participate in the scheme. Pet'rs' J.A. 37a–38a. He, in turn, ordered Parsons employees (including Mr. Hunt) to rescind the bid award to ArmorGroup, on a fraudulent basis, and instead circumvent the bidding process and award the contract to Cochise, all the while attempting to conceal the kickback scheme. Pet. App. 3a–5a; *accord* Pet'rs' J.A. 37a–40a. When Parsons employees initially refused to participate in the scheme as ordered, Mr. Shaw forged documents to fraudulently issue the rescission directive. Pet. App. 4a; Pet'rs' J.A. 38a ¶ 69. Mr. Hunt was the only witness to this forgery, Pet'rs' J.A. 38a ¶ 69, and this and other instances of

fraudulent conduct went undetected by the Government.

Cochise's subcontract cost the Government at least $1 million more per month between February and September 2006. Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79 (comparing month-on-month charges against ArmorGroup's duly awarded bid price). Petitioners' scheme thereby defrauded the Government of an estimated minimum of $6–7 million from the inflated contract price alone. *See* Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79. Additionally, the scheme imposed on the Government approximately $2.9 million for fraudulently purchased armored vehicles for Cochise that ArmorGroup already had, and would have provided at no additional cost as part of the subcontract. Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79 (alleging excess charges to the government).

Officials of the Government first learned about the nearly $10 million CMC Contract scheme when FBI agents fortuitously interviewed Mr. Hunt on November 30, 2010 regarding a separate bid-rigging scheme. Pet. App. 5a. The Government did not file an FCA suit in response to this information, but Mr. Hunt did, on November 27, 2013, within three years of his November 30, 2010 disclosures to the FBI and approximately seven years after the facts material to an FCA claim arising out of the CMC Contract accrued. Pet'rs' J.A. 6a (Doc #1, Complaint filed Nov. 27, 2013), 34a–35a (timeline of allegations material to the CMC Contract scheme), 34a ¶ 53 (procurement period, during which scheme operated to rig the Cochise subcontract, beginning Jan. 6, 2006 and ending Feb. 21, 2006).

C. Proceedings Below.

Mr. Hunt's complaint alleged that Cochise "fraudulently induced the Government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that Petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a; *see also* Pet'rs' J.A. 21a–22a ¶ 7. Hunt served the sealed complaint on the Government as the FCA requires, but it eventually declined to intervene. Pet. App. 6a, 33a n.2.

Petitioners moved to dismiss, arguing that the suit was barred by the six-year statute of limitations in § 3731(b)(1), Pet. App. 34a, because Mr. Hunt had filed suit approximately seven years after the alleged fraud in the award of the CMC security subcontract. *See* Pet. App. 34a. Mr. Hunt conceded that his complaint would be time-barred under § 3731(b)(1), Pet. App. 34a, but maintained that the action was still timely under the alternative statute of limitations in § 3731(b)(2), Pet. App. 34a, because it had been filed within three years of November 30, 2010, when Mr. Hunt first informed the Government of his employer's allegedly fraudulent activity. Pet. App. 6a.

The district court concluded that Mr. Hunt could not rely on § 3731(b)(2) to render his complaint timely. Acknowledging that the Eleventh Circuit had not yet taken a position on an extant circuit split, Pet. App. 35a–36a, the district court held the complaint was time-barred under both of the then-prevailing appellate

interpretations of § 3731(b)(2). Pet. App. 39a, 35a–40a (discussing circuit split). Specifically, the district court held that § 3731(b)(2)'s three-year statute of limitations was either unavailable to Mr. Hunt because the Government had declined to intervene in the action, or had expired because it began to run when Mr. Hunt learned of the alleged fraud in 2006. Pet. App. 37a. The district court dismissed the complaint on April 28, 2016, Pet. App. 40a, and Mr. Hunt appealed. Pet'rs' J.A. 15a (Doc. #65, May 24, 2016 Notice of Appeal).

The Eleventh Circuit reversed, Pet. App. 31a, finding the analyses of the other circuits at odds with the unambiguous statutory text. Pet. App. 13a–14a (resolving allegations of statutory ambiguity in the FCA's statutory context), 18a, 21a (recognizing rejection of "the absurdity doctrine is at odds with the published opinions of two other circuits," discussed *infra*) (citations omitted).

It further found that the statute's plain meaning fully aligned with Congress's stated purpose, Pet. App. 26a, encouraging False Claims Act suits after the Government has declined to intervene. Pet. App. 13a–15a, 18a–21a. The Eleventh Circuit expressly held that relators can rely on the limitations period in § 3731(b)(2) even when the Government does not intervene, Pet. App. 22a, departing from two other circuits' approaches. Pet. App. 21a. It further held that the three-year limitations period in § 3731(b)(2) is triggered by the relevant Government official's knowledge of the alleged FCA violation, Pet. App. 30a, not by the relator's own knowledge. Pet. App. 29a–31a. The Eleventh Circuit

explicitly rejected the Ninth Circuit's approach, Pet. App. 30a–31a, which held that a relator becomes the relevant "official of the United States" after the government declines, thus rendering the relator's knowledge dispositive for the statute of limitations inquiry. Pet. App. 30a. The court below found this "legal fiction . . . inconsistent with th[e] text" of that provision. Pet. App. 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because Hunt had informed the FBI in November 2010 and filed suit within three years of that date, the Eleventh Circuit concluded that Hunt's suit was timely and should proceed. Pet. App. 31a.

SUMMARY OF THE ARGUMENT

More than 150 years ago, Congress created the False Claims Act ("FCA") to combat fraud against the Government and recoup fraudulently obtained funds. Congress amended the Act in 1986, adding the provision at issue here, 31 U.S.C. § 3731(b)(2), which was designed to increase the FCA's effectiveness at stopping fraud by allowing more time to sue, and more private suits. The FCA's fraud-fighting mechanisms are an ongoing success, netting $2.8 billion for the Government in the past year alone. Seventy-five percent of that sum arose from suits brought by relators on the Government's behalf. These numbers are no accident; they result from a carefully calibrated approach whereby the Government and relators work in tandem. Although

the Government remains the real party in interest at all times, relators are rewarded with a graduated portion of the recovery as a way to incentivize them to come forward and bring lawsuits.

Mr. Hunt learned of a bribery and bid-rigging contract in 2006. In accordance with this statutory scheme, he reported it to the FBI in 2010, and filed suit as a relator in 2013, within three years of informing the FBI.

The Petitioner contractor-defendants assert that Mr. Hunt's suit—filed seven years after the alleged fraud but within three years of his alerting the FBI—is barred by the FCA's statute of limitations in 31 U.S.C. § 3731(b)(2).

Focusing on 31 U.S.C. § 3731(b)'s plain, unambiguous language, the Eleventh Circuit below rejected Petitioners' contention, and held that both alternative limitations periods found in the subsections of § 3731(b) apply equally to the Government and relators. Pet. App. 29a. The court further found this plain reading fully comported with the congressional purposes underlying the FCA. Pet. App. 29a.

The Eleventh Circuit is correct. No ambiguity plagues this provision. Even Petitioners cannot argue that it does. Because the plain text shows that both statute of limitations provisions are available to both the Government and relators, this Court need not wade into the murky realm of interpretation reserved for ambiguous statutes. The statute of limitations section begins by identifying the lawsuits that fall under its umbrella: civil actions in § 3730. 31 U.S.C.

§ 3731(b)(2). The Court has already determined that Government and relator suits are such "civil actions." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 421–22 (2005). The provision then describes the two potential limitations periods and ends with "whichever occurs last." 31 U.S.C. § 3731(b)(2).

This statutory language is plain. Petitioners concede as much, referring to the Eleventh Circuit's construction of the statute as "literal." When that is the case, this Court leaves the statute alone except in three rare and exceptional circumstances, none of which are present here. Petitioners skirt about the fringes of these exceptions but never squarely claim they apply in this case, instead characterizing the statutory problem as being one of "counterintuitive results." To accomplish this, Petitioners rely on Graham County as their makeweight, even though that case concerned an ambiguous statutory provision, and this case does not. In fact, Petitioners' framing of the supposed problem introduces complexity and the counterintuitive results of which they complain.

But even if this Court were to walk down the road of statutory ambiguity, the result would be the same: Relators have equal access to § 3731(b)(2)'s discovery rule. The FCA is designed to stop fraud, and its provisions work together to that end. Taken in context, Congress's linguistic choices are coherent and sensible. But viewed through the lens of Petitioners' construct, however, the provisions fall into disarray, foreclosing the recoupment of vast sums stolen from the Government. Congress differentiated between the Government and relators only when it needed to distinguish between

the rights and obligations attributed to each, and the FCA's plain language reflects that drafting decision.

Petitioners suggest an interpretation that is unsupported by the language, one that turns on the Government's often months-later (and sometimes years-later) decision whether to intervene in a relator-initiated suit. As detailed below, this makes no sense, flies in the face of traditional workings of statutes of limitations, undercuts the FCA's overarching goal, and creates superfluities. For example, the FCA's relation-back provision, 31 U.S.C. § 3731(c), would no longer operate as Congress intended under Petitioners' plan. With respect to default limitations rules, Petitioners replace the traditional trigger of knowledge with the unusual—and unworkable—concept of intervention. Far from vindicating the core limitations purposes of predictability and certainty, Petitioners inject the opposite, resuscitating cases years after filing that might otherwise have been deemed dead, simply by the fortuity of the Government's intervention.

In contrast to Petitioners' tortured approach, the Court should enforce the statute of limitation as written: six years as a general rule, extended to an additional three based on the Government official's discovery of the fraud, and in any event, no later than ten years from the date of the alleged fraud.

The statute's purposes and legislative history merely confirm everything set forth above: Congress designed a fraud-fighting system through a unique Government–relator partnership. The Government possesses the investigative power; the relator holds the inside knowledge. The limitations provisions should

bolster that purpose, not undermine it. By allowing enough time for these twin forces to work together, the 1986 FCA amendments expressly reflect Congress's intent to make that happen.

Finally, Petitioners' and amicis' collection of policy rationales for rewriting the statute fall flat. Animated by a goal Congress did not embrace (rapidity), and fueled by imagined and self-defeating bad faith on the part of relators and the Government, Petitioners warn of a parade-of-horribles stemming from any approach but their own. In reality, Congress instituted deliberate, effective safeguards to prevent the very problems that Petitioners conjure. The first-to-file bar, the public disclosure bar, the original-source rule, and the potential for reduced recoveries for bad-faith relators were all in place before Congress enlarged the statute of limitations. Because this Court need not delve into policy rationales when the statutory language is clear, it should not entertain Petitioners' alternate argument. The language is clear, so the Court need not rewrite it to pretend that private relators are "official[s] of the United States charged with responsibility to act in the circumstances."

ARGUMENT

I. Section 3731(b)(2) applies to relators regardless of the government's subsequent decision to intervene or to decline.

A. The Bedrock Rule that This Court Does Not Interpret Unambiguous Statutory Language Begins and Ends the Inquiry into § 3731(b).

If the statutory language is plain—as it is here—then this Court need not interpret it. *See Culbertson v. Berryhill*, ___ S. Ct. ___, 2019 WL 122163, *4 (Jan. 8, 2019) (stating the Court "begi[ns] with the language of the statute itself, and that is also where the inquiry should end" when the "statute's language is plain") (internal citation and quotations omitted); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotations omitted); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain . . . the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").

In fact, there is no need to "interpret" § 3731(b), as the Court's sole obligation is to apply the statute's literal terms. *Caminetti*, 242 U.S. at 485 ("[I]f the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."); *Treat v. White*, 181 U.S. 264, 269 (1901) (noting that if Congress has

acted within its authority when enacting a law, "[i]t does not come within the province of this [C]ourt to consider why [Congress chose as it did]").

Section 3731(b) unmistakably sets forth two limitations periods that apply to "civil action[s] under section 3730." 31 U.S.C. § 3731(b). Both Government-initiated suits under § 3730(a), and relator-initiated suits under § 3730(b), qualify as "civil actions", as the Court stated in *Graham*. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 416 (2005) ("[S]ection 3731(b)(1) . . . naturally applies to well-pleaded §§ 3730(a) and (b) actions."). These limitations periods are offered in the alternative—the suit initiator gets the benefit of "whichever occurs last." Thus, § 3731(b)(2) does not have to "expressly mention relators," Pet'rs' Br. 18; having given relators the power to initiate a civil action, the statute's clear language gives relators both options.

Petitioners never quite assert that this case presents a statutory ambiguity. Their brief mentions ambiguity but once, and not with reference to the question presented here. Pet'rs' Br. 16. Hence, Petitioners' heavy reliance on *Graham* is puzzling—it is a statutory ambiguity case. Petitioners essentially concede this case is not. *See* Pet'rs' Br. 11, 15, 23, 35 (stating that the literal (or even "hyperliteral") language would permit relators to resort to the statute of limitations provision in § 3731(b)(2)). Thus, the Court's finding of ambiguity in *Graham* with respect to the interplay between § 3731(b) and § 3730(h), *Graham*, 545 U.S. at 415, does little work for Petitioners in this case.

This clear meaning rule already sanctioned in *Graham* should be upended only under three "rare and exceptional" circumstances—circumstances not present here. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Proceeding beyond a statute's unambiguous language is permissible only when it would: (1) render a statute unconstitutional, *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 64 (1953); (2) create absurd results, *Crooks*, 282 U.S. at 59; or, relatedly, (3) be "impossible" to square with congressional intent, *see Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The unconstitutionality exception is not implicated in this case, and Petitioners have failed to surpass the high bar required to invoke the remaining two exceptions.

1. The Absurd Results Exception Does Not Apply.

A court may refuse to enforce unambiguous language in a statute only if the result produces an absurdity "so gross as to shock the general moral or common sense," which arises only "rare[ly]." *Crooks*, 282 U.S. at 60. Interpretive absurdity requires much more than an anomalous result; it must be one so bizarre as to confirm that Congress simply could not have intended it. *See, e.g., Pub. Citizen*, 491 U.S. at 471–72 (Kennedy, J., concurring), citing absurdity examples from *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892) (The crime of drawing blood on the streets cannot include a surgeon who rescues a bystander; a

prisoner who flees a burning prison cannot be prosecuted for escape; and the crime of obstructing the mails does not apply when a murderous postman is arrested.). A statutory result that "may seem odd . . . is not absurd." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 565 (2005). Parties cannot simply manufacture absurdities from thin air or cobble congressional intent together from disparate sources, as one must do with an ambiguous statute; there must be some indication that "make[s] *plain* [Congress's intent] that the letter of the statute is not to prevail." *Crooks*, 282 U.S. at 60 (citing *Treat v. White*, 181 U.S. 264, 268 (1901)) (emphasis added).

As a threshold matter, Petitioners do not seriously pursue the absurdity exception. Although halfheartedly invoked at the certiorari stage, they have all but abandoned it in their merits brief. *Compare* Cert. Pet. at 10 (asserting that "*Graham* directs courts to construe the sometimes 'imprecise[]' provisions of the False Claims Act within the broader context of the statute as a whole and in a way that will avoid absurd results"), *and* Cert. Pet. at 15, 20, 22 (also discussing absurdity doctrine), *with Graham*, 545 U.S. 409 (failing to reference the absurdity doctrine at all), *and* Pet'rs' Br. at 29 (mentioning absurdity only once in argument section). Instead, Petitioners have now latched onto "counterintuitive results," a passing remark from *Graham*. *Graham*, 545 U.S. at 421 (when resolving statutory ambiguity "[Section] 3731(b)(1)'s text permits a construction that avoids these counterintuitive results"). Petitioners have then grafted it onto this

Court's unambiguous-statute jurisprudence. *See* Pet'rs' Br. at 3, 9, 11, 14, 15, 17, 26, 35, 39, 45 (proposing "counterintuitive" results as a reason for this Court to construe the statutory language as excluding relators from the ambit of § 3731(b)(2)).

"Counterintuitive" results, however, do not pass the Court's absurdity muster. The Court has repeatedly instructed that even when the results are distasteful or burdensome, clear statutory language must be applied as written. *Chung Fook v. White*, 264 U.S. 443, 445-46 (1924); *Barnhart*, 534 U.S. at 459-62 (observing that invoking "counterintuitive results" is an appeal to the absurdity doctrine). Even if Petitioners had engaged in a full-throated pursuit of the absurdity exception, they could not have satisfied it. The textual, contextual, policy and legislative clues Petitioners invoke might be persuasive when this Court is deciding how to interpret an ambiguous provision, but those hints, even taken together, do not constitute the type of "clear" congressional indicia that override Congress's chosen, plain language. *See Treat*, 181 U.S. at 268. In any event, as discussed below—*see infra* Section I.B.—the FCA's overriding purpose, statutory context, and legislative history, read against statute of limitations "default rules," *Graham*, 545 U.S. at 418, favors a result that permits relators full access to § 3731(b)(2). The absurd results exception is not satisfied here.

2. Permitting Relators to Invoke § 3731(b)(2) According to Its Plain Terms Is Not "Impossible" to Square with Congressional Intent.

Another circumstance permitting courts to look beyond unambiguous statutory language is when the literal application of that text would produce a result "demonstrably at odds" with Congress's intent. *Ron Pair Enters., Inc.*, 489 U.S. at 242. Here again, the bar is high. For a party to overcome the plain, unambiguous language, it must show that it would be "quite impossible that Congress could have intended the result." *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring). This exception is sometimes subsumed within the absurdity exception. *See Pub. Citizen*, 491 U.S. at 470–71 ("This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be . . . absurd, where . . . Congress could [not] have intended the result.") (Kennedy, J., concurring). Regardless of whether it serves as a subset of absurdity or an independent basis on which to depart from unambiguous statutory language, the strictures are the same: the contrary intent must have been "clearly expressed" by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983) (internal quotation marks omitted). Thus, if the legislative history and surrounding provisions are anything but clear—if they are inconclusive—then the Court should not override the unambiguous language.

Here, at worst, the legislative history and surrounding provisions are inconclusive. In context, they affirmatively support Respondent's, and the Eleventh Circuit's, conclusion: relators may invoke § 3731(b)(2). *See infra* Sections I.B.1., I.B.3. Either way, Petitioners cannot meet their burden of showing the "impossibility" required to overturn the unambiguous language. Congressional arbitrariness is not enough. *FBI v. Abramson*, 456 U.S. 615, 640–41 (1982) (O'Connor, J., dissenting) ("We do not, and should not, make it our business to second-guess the Legislature's judgment when it comes to [matters of congressional line-drawing]. Line-drawing, after all, frequently requires arbitrary decisions that cannot sensibly be subjected to judicial review."). Even mistake and inadvertence do not warrant this Court's intervention into otherwise unambiguous statutory language. *See Unexcelled Chem.*, 345 U.S. at 64 ("[W]hen Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final. . . ."). Thus, even against a backdrop of inartful drafting or inconclusive legislative history, the unambiguous language triumphs. Petitioners provide no basis for this Court's rewriting of this unambiguous statutory language.

B. Even if § 3731(b)(2) Were Ambiguous, that Ambiguity Is Resolved in the Relator's Favor by the FCA's Statutory Structure, Statute of Limitations Defaults, and the FCA's Purpose.

If § 3731(b)(2) is ambiguous, all interpretive tools for resolving that ambiguity point in one direction: giving FCA relators (b)(2)'s discovery rule. *Graham*'s own ambiguity-resolving tools—statutory context and default statute of limitations rules—each independently confirm that (b)(2) applies to non-intervened actions. *See Graham*, 545 U.S. at 417–18 (resolving FCA retaliation ambiguity by drawing on the FCA's statutory structure and default rules for statutes of limitations). Beyond these tools, the FCA's statutory purpose and its legislative history also lead to the same result: § 3731(b)(2) applies to relator-brought suits regardless of Government intervention.

1. Reading § 3731(b)(2) to Cover All *Qui Tam* Actions Advances the FCA's Coherent Structure and Procedural Plan.

The FCA has a deliberate structure that furthers a unique procedural plan. The statute creates complementary but distinct procedural roles for the relator and the Government during litigation, while granting potential party status to both. To be coherent, the FCA's structure and this plan command a reading that puts relators on the same statute of limitations footing as the Government. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("A fair reading of legislation demands a

fair understanding of the legislative plan."). That is so for three reasons. First, the FCA uses particular language when differentiating between the Government and relators, but then abandons that language when it does not. Section (b)(2) is squarely the latter type of section; it has no language differentiating relators from the Government and thus applies to both. Second, even if the statutory scheme permitted reading (b)(2) to distinguish between relators and the Government, it certainly does not support Petitioners' further cut between intervened and non-intervened actions. Third, Petitioners' argument that (b)(1) is superfluous if (b)(2) applies to non-intervened actions is not only belied by the plain language of (b)(2) itself, but legally untenable. Indeed, it is Petitioners' reading that makes a § 3731 provision superfluous—subsection (c)'s relation-back provision.

a. Consistent with the FCA's Procedural Scheme, § 3731(b) Equates the Government and Relators.

The FCA's linguistic framework reflects a two-pronged procedural plan. One prong deals with the Government and relator's distinct but complementary roles in the litigation process. The FCA uses "government" and "person" when it needs to distinguish one from the other. *See* 31 U.S.C. § 3730(b)–(d) (using "government" and "person" to describe each actor's procedural rights and limitations in intervened and non-intervened actions). For example, the Government and the relator operate independently in deciding to bring

or join a suit, 31 U.S.C. § 3730(a), (b)(2), (b)(4), (c)(1), (c)(3); the Government has sole investigatory power during the seal period, *id.* § (b)(2)–(3), and if it does not intervene, the Government has the right to be served copies of discovery, may ask to suspend discovery or limit the relator's participation, and retains a dismissal veto, *id.* § (b)(1), (c)(2)(C), (c)(3), (c)(4). In turn, the relator has independent rights even in Government-intervened actions. *Id.* § (c)(1), (2)(A). In these sections, "government" means only the Government and "person" means the relator.

At other times, however, when Congress did not need to confer different rights and obligations on the Government and a relator, the FCA dispenses with the dichotomy. For example, § 3731(d) refers to the "United States" as bearing the FCA's preponderance burden of proof. 31 U.S.C. § 3731(d). In choosing to name the "United States" here, Congress was not distinguishing between relators and the Government. Indeed, under default burden of proof rules, the relator bears this same burden in non-intervened suits. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003) (reasoning that statutory silence on the burden of proof defaults to the "conventional rule" that "requires a plaintiff to prove his case by a preponderance of the evidence") (internal quotation marks omitted); *see also United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707 (7th Cir. 2014) (applying the preponderance burden to relators); *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1472 (9th Cir. 1996) (same); Claire M. Sylvia, *The False Claims Act: Fraud*

Against the Government § 10:107 (2018) ("Nor would application of different standards comport with the purposes of the Act, which are to permit the relator to stand in the shoes of the Government.").

Congress's choice of "United States" in subsection (d) does not mean that it intended to excise non-intervened cases from (b)(2), as Petitioners suggest. Pet'rs' Br. 19–20 (relying on *Graham*). First, *Graham* said nothing about *qui tam* actions or the applicability of § 3730(b)(2) to such cases. It dealt with § 3730(b)(1)'s inapplicability to private *retaliation* cases—cases that have nothing to do with the Government or relators acting in a *qui tam* status. Second, had Congress intended to carve out declined suits, it could have simply done so by adding "by a person or the government" in (b)(1) and "by the government" in (b)(2). It did not.

Section 3731(b), as actually written, fits this statutory scheme only if both its limitations periods apply to both actors. Unlike § 3730, whose "government" and "person" refer to autonomous actors, § 3731(b) makes no such distinction. Instead, its prefatory language refers cohesively to "a civil action under 3730" and just as cohesively pulls (b)(1)'s six-year rule and (b)(2)'s discovery rule options together in the final clause, "whichever occurs last."

b. Nothing in § 3731(b) Supports Distinguishing Between Intervened and Non-Intervened Actions.

Even more strained than a Government-brought and relator-brought suit distinction is Petitioners' further delineation: applying (b)(2) to relator-brought actions only if the Government later decides to intervene. Given that the FCA plainly differentiates between Government-as-actor and relator-as-actor when it needs to, there is no support for reading subsection (b)(2)'s actor-neutral language to make two cuts—one that excludes declined actions but includes intervened actions.

Arguing that applying § 3731(b)(2) to declined actions would render § 3731(b)(1) superfluous, Petitioners ignore the word "after" in (b)(2): "(b) A civil action under 3730 may not be brought . . . (2) more than 3 years *after* the date when facts material to the right of action are known or reasonably should have been known. . . ." (emphasis added). Giving effect to the word "after," no relator who learned about the fraud and waited ten years to file without telling the Government could use (b)(2). Pet'rs' Br. 26–28. Subsection (b)(1) applies precisely where it is needed most—to spur relators to approach the Government with information about fraud sooner rather than later.[2]

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[2] It is true that (b)(1) will bar some diligent relators, such as the accountant who uncovers his employer's fraud after six years and then rushes to the courthouse without involving the

Section (b)(2)'s temporal specificity fits the objective of discovery-based statutes of limitations: to catch wrongdoers who hide their illegal acts, preventing their discovery until well into or after the limitations period. *See Gabelli v. SEC*, 568 U.S. 442, 450–51 (2013). Under a discovery-based limitation period, the victim learns of the wrong—or has enough information available to it that it should have known—and then files suit within a defined period of time.[2] *Id.* The same progression applies in FCA (b)(2) cases: the fraud victim—here, the Government—learns of the fraud, and then either the Government or the relator is empowered to file suit within three years, but in no event more than ten years after the fraud was committed. In no situation should (b)(2) apply when suit precedes knowledge.

Nor, as a basic legal matter, can the stricture against "superfluous" statutory language be invoked simply because there is some temporal overlap between (b)(1) and (b)(2). "Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws, a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (internal citation and quotation omitted) (where neither statutory provision renders the other "wholly superfluous" the canon against superfluous legislation does not apply). So long as there is a meaningful difference between overlapping

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government. But no statutory scheme achieves perfect results, and this scheme fundamentally motivates reporting.

[2] Petitioners' authorities confirm that this is how discovery-based limitation rules work. Pet'rs' Br. 24 n.4.

statutory provisions, there is no reason to judicially reconstrue them. *Husky Int'l Elecs. v. Ritz*, 136 S. Ct. 1581, 1588 (2016). Petitioners do not remotely claim that (b)(1) and (b)(2) are positively repugnant to each other, or that there is no meaningful difference between them. Mere overlap does not render statutory provisions suspect, and Petitioners' superfluous argument thereby founders.

c. Petitioners' Strained Reading of Subsection (b)(2) Reads the Relation-Back Provision out of the FCA.

Conversely, Petitioners' own interpretation would make superfluous the relation back provision in § 3731(c). That section, added in the 2009 amendments to the FCA, *see* Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617, provides that when the Government elects to intervene, "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action." That section was added to overturn decisions barring relation back in cases where the seal period was extended and the defendant did not have prior notice of the relator's complaint. *Id.* (overruling, *e.g.*, *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006)). With subsection (c) now in place, the Government's intervention is timely as long as the relator's action is timely. For example, if the Government learns of the fraud in year five, the relator sues in year seven, and the Government intervenes in

year nine, (b)(2) will apply to the relator's suit and (c)'s relation back provision will make Government intervention timely.

Petitioners' reading disrupts this scheme. If Petitioners' reading holds, the Government's intervention would not relate back to the relator's suit. It would instead trigger an entirely different statute of limitations at the moment of intervention, extending the period from six to ten years. *See* Br. for Amicus Curiae Professor Joel D. Hesch ("Hesch Br."), at 10–11. In effect, the relator's suit would "relate forward" to the Government's filing rather than the Government's filing relating back.

In sum, Congress knew when it needed to make clear distinctions between the Government and relator and when it did not, and wrote the FCA accordingly. The only interpretation that fits this scheme and Congress's procedural plan is one that applies (b)(2) to relator suits whether the Government intervenes or not.

2. Against the Backdrop of Default Statute of Limitations Rules, (b)(2) Must Be Read to Encompass Non-Intervened Actions.

Independent of statutory context, *Graham*'s second interpretive tool—reading statutory text in accord with default limitations rules—confirms that (b)(2) applies to non-intervened cases. In *Graham*, the Court refused to make the employee's FCA retaliation claim accrue before it even started: that is, before the

employer even punished the employee for engaging in FCA activity. 545 U.S. at 418–21. To hold otherwise would have upset the default rule that limitations periods begin when the cause of action accrues, for the clock would have started with the defendant's fraud rather than the defendant's retaliatory act. *Id.* at 421.

The opposite is true here. Applying (b)(2) in non-intervened cases promotes default limitations rules in two ways. First, pegging (b)(2)'s limitations period to Government knowledge in all cases honors the core value that statutes of limitations be certain at the time of filing. This same reading respects the default discovery-based limitation rule that victim knowledge triggers accrual, which is the guiding principle when the victim is the real party in interest, no matter who brings suit. In contrast, rather than making pre-suit *knowledge* the accrual flashpoint, Petitioners' reading would trigger accrual based on post-suit *intervention*—in effect producing a springing statute of limitations that expands or contracts based on the Government's unpredictable and non-transparent intervention decision.

To square with default limitations rules, (b)(2) must be read to promote predictability and certainty. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014) (articulating the "basic policies furthered by all limitations provisions" as "certainty and repose") (internal alterations and citations omitted); *Greyhound Corp. v. Mt. Hood States, Inc.*, 437 U.S. 322, 335 (1978) (rejecting a statute of limitations reading that would produce "confusion and uncertainty" against the "congressional

emphasis on certainty and predictability"). Knowing the limitations period right from the start relieves the parties of crippling uncertainties: for plaintiffs, being unsure of when to file or what will happen if they do; for defendants, being unable to move on with their affairs and freezing their resources at the prospect of damages. *Cf.* William Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice of Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 531 (2015) ("Without a clear rule," the parties are "left to a lawyer's best guess as to which statute of limitations applies.").

If (b)(2) applies to both intervened and non-intervened relator actions, uncertainty will be laid to rest. There will be one timeline for filing suit, and it will not budge. This timeline will start with the Government learning the "facts material to the right of action," and it will end three years later—and in no event more than ten years after the fraud. Because this reading of (b)(2) applies only when the Government's knowledge *precedes* the relator's filing, as explained *supra* I.B.1, by the time the relator files suit the statute of limitations will be firm and clear to all. Although the parties may end up litigating whether or when the Government "knew or should have known" the material fraud facts, that litigation reality applies equally to intervened suits. Petitioners overstate the hassle of litigating this issue. *See* Pet'rs' Br. 32. The Government is entitled to receive FCA discovery even in declined cases, 31 U.S.C. § 3730(c)(3), and can hardly complain if called upon to produce its own documents and

witnesses. In any event, participating in a discrete, threshold discovery issue will be a small price to pay for the certainty that comes with giving relators and the Government a uniform and predictable statute of limitations.

Meanwhile, Petitioners' (b)(2) reading throws certainty out the window. If (b)(2) applies to relator-brought cases only when the Government later intervenes, no one will know if the case is timely until the intervention deadline, which is at least sixty days *after* the relator files.

During this "limbo" period, the relator will not know whether his claim is stale or live. "It would hardly be desirable to place the question of tolling *vel non* in this jurisprudential limbo, leaving it to be determined by those later events, and then pronouncing it retroactively." *Wallace v. Kato*, 549 U.S. 384, 395 (2007) (rejecting interpretation of a tolling period whose application would depend on a later-filed suit). Even though the defendant is not entitled to notice of the action during the seal period, defendants often learn about the relator's suit through informal avenues, *see infra* I.C., which means the defendant will suffer the same paralysis. From the Government's perspective, intervention decision-making will be distorted. To save otherwise time-barred cases, the Government may be pressured to intervene when sound resource and enforcement judgment counsel otherwise. Considerations such as agency priorities, personnel availability, and allocation of resources will bow to the exigency of keeping the case alive. *See United States ex rel. Ubl v. IIF*

Data Sols., 650 F.3d 445, 457 (4th Cir. 2011) (internal citation omitted) ("Given its limited time and resources, the Government cannot intervene in every FCA action, nor can the government pursue every meritorious FCA claim.").

Even more troubling, if the Government *does* intervene, the case will magically transform from barred to live based on a party's post-filing action—a phenomenon completely foreign to statute of limitations doctrine and inconsistent with discovery-based limitations rules. Whether or not the Government intervenes, nothing that matters to statutes of limitations has changed. If the Government learned about the fraud five years after it happened and the relator filed suit in year seven, for instance, a post-filing intervention does not change the time span between the accruing event (occurrence or knowledge of fraud) and suit, which is how discovery-based statutes of limitations are measured.

Worse yet for the certainty principle, under Petitioners' reading, the case could be well along before the statute of limitations firms up. Because the FCA permits Government intervention at any time for good cause, 31 U.S.C. § 3730(c)(3), the specter of a springing statute of limitations continues to loom. Following an initial declination, the relator and defendant could be midway through a statute of limitations dismissal motion only to have the Government's intervention moot it by expanding the limitations period. This is anathema not only to how statutes of limitations work, but also to how intervention works. Intervenors may toll

actions, *Greyhound Corp.*, 437 U.S. at 330–36, and intervenors may relate back to the original complaint, *see* 31 U.S.C. § 3731(c), but in no case do intervenors trigger an entirely different statute of limitations, *see* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2019) ("The intervenor is treated as if the intervenor were an original party. . . . [he] must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell.").

Petitioners make much of the unexceptional notion that tolling typically turns on the knowledge and acts of the plaintiff, not a non-party. Pet'rs' Br. 23–26. Specifically, they reason that (b)(2) is not available to relators in non-intervened suits because that subsection turns "on the knowledge of a government official," yet tolling turns on only the "plaintiff's" knowledge, and the Government is not the plaintiff in non-intervened suits. Pet'rs' Br. 23–26. This argument ignores the relator's and Government's related but distinct rights. In non-intervened suits, the FCA splits what would otherwise be one plaintiff into two actors: a "party" (the relator) and a "real party in interest" (the Government).[4] In such suits, the Government remains

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[4] Given the near-unique status of *qui tam* actions, *Vt. Agency*, 529 U.S. at 768 n.1, it is unsurprising that the Eleventh Circuit would not cite a case "outside the False Claims Act setting in which a court tied the running of a statute of limitations to the knowledge of a real party in interest who was not also an actual party to the case." Pet'rs' Br. 26. The pertinent question is why Petitioners rely on non-*qui tam* case arguments to explain how a *qui tam* suit should function.

the real party in interest, that is, the "actor with a substantive right whose interests may be represented in litigation by another." *Eisenstein*, 556 U.S. at 934–35. In FCA cases, the Government's substantive right is as fraud victim; the relator has no such injury. *Vt. Agency*, 529 U.S. at 772–73. The relator's stake is different; it manifests as an "assignee assert[ing] the injury in fact suffered by the [government] assignor." *Id.* at 773.

With this in mind, Petitioners' Government-must-be-the-plaintiff argument fails. In the mine run of tolling cases, courts use "plaintiff" as shorthand for victim—the one who has suffered injury. In reality, accrual and tolling principles apply to the civil victim with substantive rights no matter who appears in the suit to enforce them. *See* Evan Caminker, *supra*, at 354 n.71 ("[A]ny given false claims practice ought to be understood as creating but a *single* . . . injury under the Act. [T]he 'true' plaintiff . . . must be the United States, *no matter who brings an action on its behalf.*") (emphasis added) (internal quotations and citations omitted). Because that victim in FCA cases is the Government, it is the Government's knowledge that matters for tolling principles and (b)(2).

3. The Relator's Critical Role in Recouping Government Funds from Fraudsters Requires Equal Access to the Act's Limitations Periods.

Graham's two interpretive tools settle the question of (b)(2)'s application to non-intervened cases. And

the tools left in the box—statutory purpose and legislative history—dictate the same result. Congress set up three co-equal paradigms for FCA enforcement, and it did not single out declined actions for less favorable statute of limitations treatment. Indeed, the relator's and Government's hand-in-glove partnership to recoup pilfered funds cannot work otherwise. Any way the relator's is role is considered—functionally as partner combatting fraud or legally as assignee—it would contravene the FCA's fraud-fighting purpose to shorten the lives of their claims just because the Government declines the action. The legislative history of the FCA's 1986 amendments shows a firm congressional commitment to bolstering the FCA's private right of action and to fortifying the means to expose hidden fraud. These FCA purposes are fundamentally at odds with depriving relators—that critical "posse of ad hoc deputies [which] uncover and prosecute frauds against the government," *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. (1992)—of (b)(2)'s discovery rule.

a. Relators and the Government Are Synergistic Partners in the Fight Against Fraud.

Congress built into the FCA a unique public-private partnership: the FCA is the Government's premier anti-fraud weapon, and the relator its main crusader. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2011) ("'Encouraging more private enforcement suits serves to strengthen

the Government's hand in fighting false claims.'") (internal quotations omitted); Pamela Bucy Pierson & Benjamin Patterson Bucy, *Trade Fraud: The Wild, New Frontier of White Collar Crime*, 19 OR. REV. INT'L L. 1, 33 (2018) ("The FCA's effectiveness is due, in large part, to the public-private partnership it creates between individuals, known as *qui tam* relators, and the U.S. Department of Justice."). Congress decided that recruiting individuals with inside information and appealing to their self-interest was the best way to stop fraud and to get the public treasury its money back. The Act's statute of limitations in section (b)(2) must be construed in light of this purpose. If (b)(2)'s addition enhances the Government's ability to do these things, including relators in the enforcement regime does so even more.

The FCA–relator partnership is enriched by the relator's insider status. Complex, well-hidden fraudulent schemes—common in defense contracting cases—will see the light of day only if someone close to the transaction exposes it. Pierson & Bucy, *supra*, at 42 ("Because few individuals are foolish enough, careless enough, or bold enough to submit false claims without creating complex cover-ups, there is always concealment. . . . fraud cannot be effectively detected or deterred without the help of those who are intimately familiar with it."). Relator-insiders have industry expertise and know the business's customs and habits; they know the players and their motivations and agendas; and most important, they know where to find the evidence. *Id.* at 42–43. Relators are, in short, powerful,

efficient partners. *Id.* at 42. This partnership works. Between 1986 and 2018, FCA cases brought back more than $59 billion to the treasury—with 72 percent coming from relator-brought actions. Department of Justice, "Fraud Statistics—Overview, Oct. 1, 1987—Sept. 30, 2018, U.S. DEP'T OF JUSTICE," available at https://www.justice.gov/civil/page/file/1080696/download. In fiscal year 2018 alone, the Government recovered over $2.8 billion in FCA settlements and judgments—with seventy-five percent coming from relator-brought actions. *See* U.S. Dep't of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018*, DEP'T OF JUST. OFF. OF PUB AFF. (Dec. 21, 2018), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

Nothing in the Act or its purposes even hints that Congress wanted to throw away non-intervened cases. Indeed, over the FCA's 150-year history, Congress has resisted judicial efforts to narrow the Act. Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into A Modern Weapon*, 65 TENN. L. REV. 455, 460 (1998); James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1278 (2013).

Adopting rigid interpretations that inhibit relator actions would "prejudice the Government by depriving it of needed assistance from private parties." *State Farm*, 137 S. Ct. at 443. Although the FCA sets some procedural restrictions for relators, all of these are

consistent with Congress's goal to encourage private actions by relators who have something truly valuable to give the Government. *See infra* Part I.C.

b. As Partial Assignees of the Government's FCA Damages Claim, Relators "Stand in the Government's Shoes" for Suit-Bringing Purposes, Including the Applicable Statute of Limitations.

The relator's role as "partial assignee" of the Government's damages claim confirms that for statute of limitations purposes, relator-initiated claims in declined cases survive equally as long as Government-managed cases. *Vt. Agency*, 529 U.S. at 773. When a suit begins, the relator "stands in the Government's shoes—in neither a better nor worse position than the Government stands when it brings suit." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006); *see* 31 U.S.C. § 3730(b) ("A person may bring a civil action for a violation of section 3729 *for the person and for the United States Government*.") (emphasis added). Putting the relator in those procedural shoes, the FCA "gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Vt. Agency*, 529 U.S. at 772. This interest continues whether or not the Government intervenes. If the Government does join, the relator has the right to stay on as a party, to a hearing before voluntary dismissal, and to object to settlement. *Vt. Agency*, 529 U.S. at 772 (citing 31 U.S.C. § 3730(c)(1), (c)(2)(A), (c)(2)(B)).

Most significant, the relator retains a right to recover in intervened actions, a fee that remains substantial at fifteen to twenty-five percent. 31 U.S.C. § 3730(d)(1).

This Congressional vision fails if (b)(2)'s discovery rule arbitrarily carves out non-intervened cases. The interest Congress gave relators in their FCA lawsuits would be impaired if that interest were extinguishable *post-hoc* by the fact of Government declination. Moreover, if a relator cannot use (b)(2) to sue in cases where the fraud was best-concealed—or if there is rampant uncertainty about whether he can—then the FCA cannot reach the worst kind of activity it was designed to stop.

c. Because the FCA's 1986 Amendments Promoted Relator-Driven Suits, the Discovery-Based Limitations Rule Added by Those Amendments Must Be Read Accordingly.

After a period of relative disuse, Congress amended the FCA in 1986 to revive the Act in the wake of federal program expansion and, consequently, more government spending and opportunities for fraud. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497–98 (11th Cir. 1991); S. Rep. No. 99-345, at 2–3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–68. That same year, the DOJ estimated that fraud had claimed between one and ten percent of the entire federal budget. S. Rep. No. 99-345, at 3 (1986),

as reprinted in 1986 U.S.C.C.A.N. 5266, 5268. Indeed, "45 of the 100 largest defense contractors, including nine of the top 10, were under investigation for multiple fraud offenses." *Id.* at 32. "At the time, 'perhaps the most serious problem plaguing effective enforcement' of the FCA was 'a lack of resources on the part of Federal enforcement agencies.'" *State Farm*, 137 S. Ct. at 443 (quoting S. Rep. No. 99-345, at 7 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5272).

Congress rejoined with a set of reforms, many aimed at giving the Government the whistleblower help it needed. *State Farm*, 137 S. Ct. at 443 (citing S. Rep. No. 99-345, at 23–24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89). "The basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'" *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (internal citation omitted). Relator-targeted reforms included giving relators the right to continue as parties in intervened actions, 31 U.S.C. § 3730(c)(2)(B), adding an anti-retaliation provision to protect relators, 31 U.S.C. § 3730(h), and increasing relator rewards from ten up to twenty-five percent in intervened cases and from twenty-five up to thirty percent in declined cases. *Compare* 31 U.S.C. § 3730(c)(1)–(2) (1982), *with* 31 U.S.C. § 3730(d)(1), (d)(2) (1994).

Most significantly, Congress added (b)(2)'s discovery-based limitations rule to help the Government catch more fraud, giving suit-bringers the option of the most

favorable time period—whichever occurs last.[5] The express goal of this section was to "'ensure the Government's rights are not lost through a wrongdoer's successful deception,' because 'fraud is, by nature, deceptive.'" *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035 (9th Cir. 1998) (citing S. Rep. No. 99-345, at 15 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5280). Petitioners provide no reason that Congress would have wanted to bar relators from exposing well-hidden frauds, while allowing the Government to sue for the same fraud.[6] Although relators are often better-positioned to discover fraud than the Government, it does not mean that Congress intended a

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[5] It does not aid Petitioners that (b)(2) was imported from 28 U.S.C. § 2416(c), which sets a general statute of limitations for government-brought civil actions. As explained in Part II *infra*, (b)(2)'s "official of the United States charged with responsibility to act in the circumstances" refers to the knowledge of a subset of Government actors; it does not delimit who may sue under this limitations period. Moreover, Congress enacted §§ 2415–2416 to ***align*** government and private citizens' ability to sue for fraud. 89th Congress, Establishing a Statute of Limitations for Certain Actions Brought by the Government, Committee on the Judiciary, S. Rep. No. 1328, June 24, 1986, at 6–7. The same language in the FCA cannot be used to ***elevate*** the Government's rights ***over*** private litigants when those very litigants fulfill a primary enforcement role.

[6] Moreover, in this same package of amendments, Congress added the provision allowing the government to initially decline and then later intervene in relator suits for "good cause." 31 U.S.C. § 3730(c)(3) (1994). It defies logic that Congress would permit late intervention if that act could abruptly alter the statute of limitations.

wholesale ban on relators' ability to use (b)(2)'s discovery rule in declined cases.

Notwithstanding Petitioners' efforts, "it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose." *Solem v. Bartlett*, 465 U.S. 463, 478 (1984). Petitioners' meager recitation of legislative history arguments, none of which actually address (b)(2)'s applicability to *relators*, does no better than that. Unremarkably, DOJ's statements to Congress in support of amendments suggested by the Attorney General reflect DOJ's own contemporaneous interests, which interests are of a piece with relator-driven suits vindicating precisely the same Government objectives. Pet'rs' Br. 36–37. Pretending as though Senate and House Reports were statutory language, Petitioners also insist that those reports' references to the Government's ability to use (b)(2) mean that this section provisionally excludes relators unless the Government intervenes. Pet'rs' Br. 37–38. But the fact that the Government testified about its own interests says nothing about what Congress thought about a relator's status within (b)(2).

Petitioners' sole support for Congress's "careful[] distinction between the government and relators throughout the legislative history" is a House Report that underscores *expanded* relator rights to remain a party to intervened suits, and the Government's ability to halt relator discovery that interferes with the Government's. *See* Pet'rs' Br. 38. This Report says what the statute already makes manifest: relators and the Government are autonomous actors and decision-makers,

but their fraud claims have the same longevity. These scraps of legislative history cannot be used to manufacture congressional intent. "Nothing in the legislative history" of the FCA "confirms that this particular point"—(b)(2)'s applicability to relators—"bore on the congressional deliberations or was given specific consideration." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004).

To the extent the legislative history of the 1986 FCA Amendments informs at all, it demonstrates the overriding objective of doing everything possible to roll back rampant procurement fraud. Petitioners' reading of (b)(2) sidesteps the critical prosecution role that FCA relators have played throughout its history. Moreover, their contrived legislative history contravenes the legislation that was actually enacted. After purposefully empowering relators in 1986, Congress would not have given to relators with one hand and taken away with the other.

C. Petitioners' Policy Arguments Ignore the Realities of FCA Litigation and Undercut the Language and Purpose of the Act.

Halting ongoing fraud, deterring future fraud, and recouping monies are what drives the FCA, as even Petitioners acknowledge. *See* Pet'rs' Br. 3 (citing *Escobar*, 136 S. Ct. 1989, 1996 (2016)); *see* 31 U.S.C. § 3729(a) (outlining civil penalties and treble-damages scheme). Section 3731(b)(2) furthers these goals by allowing

parties additional time to develop and pursue claims. Perhaps recognizing this, Petitioners and their amici inject two additional considerations that pave the way for a series of policy arguments otherwise unavailable to them.

First, Petitioners assert that Congress's animating interest was to ensure the prompt filing of claims when it enacted a provision enlarging the time for filing them. Pet'rs' Br. 28–29. Petitioners' sole authority for this proposition is the Tenth Circuit decision in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006). Pet'rs' Br. 28–29. The Tenth Circuit's sole authority, in turn, for its promptness rationale was a snippet from a Senate report, which, when read in its entirety, stands for an entirely different proposition.[7] *See Sikkenga*, 472 F.3d at 725 (concluding from Senate report that "Congress

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[7] That report reads, in relevant part:

> [The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompass it on every side, and should be construed accordingly. *It was passed on the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.* Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

S. Rep. No. 99-345, at 11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Oregon 1885)) (emphasis added).

viewed qui tam prosecutions as providing a means to achieve *rapid* exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities"). Congress's comparison between the "enterprising privateer" and the "slow-going public vessel" was meant to demonstrate not promptness, but rather, effectiveness.

The second animator of Petitioners' (and amici's) policy arguments is a presumption that relators will act in bad faith by delaying their claim filing in order to maximize damages. Pet'rs' Br. 28–29 (envisioning a "strong incentive . . . for relators to decline to disclose the fraud to the government" in order "to enhance their ultimate financial recovery—by keeping the Government in the dark," thus "permitting relators to intentionally delay up to *ten years* before filing"); Pet'rs' Br. 43 (stating "[t]olling rules are not intended to assist plaintiffs who . . . elect to 'sleep on their rights'") (internal citation omitted).

In fact, there are many valid and good-faith reasons why a relator may delay her filing, just as there are many why the Government may need to seek additional time to investigate a claim.[8] Once these two

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[8] For example, a relator may uncover the fraud years after it happens, such as when she assumes a new accounting role and finally accesses the documents that show irregularities. She may not know the FCA exists; she may hesitate because she fears retaliation. She may be deployed overseas and be unable to pursue domestic litigation from afar, or she may have engaged in a proffer

unfounded presumptions are stripped away, what remains is Congress's stated goal of stopping fraud and its clear efforts to permit maximum recovery while simultaneously disincentivizing game-playing in the process. Taken together, they show that the language Congress chose for § 3731(b)(2) vindicates all of its stated goals. As detailed below, they undermine Petitioners' and amici's parade-of-horribles policy arguments.

First, Petitioners claim that if relators are allowed resort to § 3731(b)(2) they will "have a longer period to sue than the government in some scenarios." Pet'rs' Br. 26. Perhaps, but only rarely, for two reasons. First, whistleblowers are often actively involved in supplying the Government's actual or constructive knowledge. *See* 31 U.S.C. § 3731(b)(2) (additional three-year period triggered from when the Government knew or "should have known"). They either provide the requisite first-hand reporting directly to the "official of the United States charged with responsibility to act in the circumstances," 31 U.S.C. § 3731(b)(2), or to an agency employee who takes it up the chain of command. *See* 132 Cong. Rec. S11, 238 (1986) (Senator Grassley explaining amendments and stating that "care should be taken to assure that the information has reached an official in a position both to recognize the existence of a possible violation of this act and to take steps to address it"). Or, whistleblowers can provide the necessary corroboration if the Government suspects fraud in the

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agreement with the Government that prevents her from pursuing a civil action until the conclusion of a criminal case.

first instance. *See id.* (Senator Grassley noting that "courts should be leery of finding that the Government had knowledge of the existence of a possible cause of action based merely upon the discovery of irregularities that fall short of a concrete suspicion that fraud has occurred" and "[s]ome corroborative information to support that suspicion should be required").

If that whistleblower wants to become a relator, then she knows she has three years from the time she informed the Government to file her suit. If the fraud is known by more than one person and the initial whistleblower opts not to file a *qui tam* lawsuit, then theoretically the relator who brings suit would get the free pass of which Petitioners and their amici complain.

But that would be rare, for the second reason: a relator who opts to delay past the six-year default statute of limitations without ever contacting the Government would be barred from suit under (b)(1). *See supra* I.B.1. And any relator who delays still risks that her suit would be preempted by a Government suit, public disclosure, or another whistleblower. *See* 31 U.S.C. §§ 3730(e)(4)(A)–(B), (b)(5) (first-to-file, original source, and public disclosure provisions).

Petitioners aver that because DOJ did not issue its "Relator Share Guidelines" until December 1996, "[t]he possibility that a reduced award would deter delay by relators could not have informed Congress's decision-making [in 1986] about whether to make Section 3731(b)(2) available to relators" in non-intervened cases. Pet'rs' Br. 32. Petitioners are mistaken. "In

crafting provisions [in 1986] that specify the relator's recovery and in amending the jurisdictional provisions, Congress attempted to 'walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.'" *United States ex rel. DeCarlo v. Kiewit/AFC Enters.*, 937 F. Supp. 1039, 1046 (S.D.N.Y. 1996), quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). Well before the issuance of the Guidelines, courts construed the maximum relator's share under § 3730(d), authored by the 1986 Congress, as being available for "only those individuals whose conduct in disclosing the fraud is virtually flawless," and held that the relator's share should be reduced when he delays reporting the fraud. *United States v. General Elec.*, 808 F. Supp. 580, 584 (S.D. Ohio 1992), *aff'd in relevant part*, 41 F.3d 1032 (6th Cir. 1994).

Not only did Congress envision whistleblower involvement when enacting § 3731(b)(2), it also can be presumed to have been aware of these disincentives to relator delay and to have drawn its lines accordingly. That a rare relator might be able to dodge these barriers to relief may well have been acceptable to Congress if the line drawn vindicated the overarching goal of halting fraud and recouping lost monies. Policy line-drawing, however arbitrary, is solely an exercise for Congress, not the judiciary. *Unexcelled Chem.*, 345 U.S. at 63-64; *accord Abramson*, 456 U.S. at 640–41 (O'Connor, J., dissenting).

Petitioners' and amici's remaining policy arguments merit little discussion. Their claim that relators

could use § 3731(b)(2) to "[maximize] damages from the ongoing misconduct," Pet'rs' Br. 28–29, is a charge that could equally be leveled at the Government because it can reap thrice what it loses. Yet that did not halt Congress from enacting § 3731(b)(2) to enlarge the amount of time available to pursue fraud, including against those who choose to engage in "fraudulent activity that spans a number of years." *See* Pet'rs' Br. 29, n.6.

Amicus Washington Legal Foundation ("WLF") laments that FCA defendants remain in the dark about the allegations for years. This does not square with the realities of FCA investigations. Br. for Amicus Curiae WLF at 12, 14, 16. While FCA defendants are not served with the complaint while the case remains under seal, 31 U.S.C. § 3730(b)(2), defendants frequently receive substantial notice of the claims against them. As WLF acknowledges, the Government often uses the seal period to engage in discovery (interviews, depositions, and written discovery) or settlement negotiations, which should further elucidate for the defendants the basis of the claims. Br. for Amicus Curiae WLF at 12, 14. In short, defendants often have informal notice of the existence and substance of the *qui tam* complaint, which undercuts amicus's claim that applying § 3731(b)(2) to relators will lead to rampant due process violations. *See, e.g.*, *Baylor University Med. Ctr.*, 469 F.3d at 270 n.8 (acknowledging that during the time under seal "some of the hospitals in this case received partial (and largely informal) notice of the existence and substance of [the *qui tam* complaint]"); *see*

also Br. for Amicus Curiae WLF at 15 (citing *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997)) (acknowledging that district courts have the power to lift the seal against the Government's wishes).

In short, the policy arguments as framed by Petitioners and amici provide little aid to the Court in resolving the question presented. Such arguments are not relevant when the plain language governs. *See supra* Section I.A.; *see also Unexcelled Chem.*, 345 U.S. at 64. And even if policy arguments serve a purpose when resolving ambiguities, the positions offered here do not. They are founded on a presumption that the Government and relators act only in bad faith, and attribute to Congress an overarching purpose it did not adopt (promptness) while downplaying the purpose that all agree was the Act's impetus: effectively stopping fraud and securing the recovery of Government funds.

II. RELATORS ARE NOT AND DO NOT AT ANY POINT BECOME "OFFICIALS OF THE UNITED STATES" UNDER THE PLAIN LANGUAGE OF THE ACT.

Petitioners' alternative argument is that if § 3731(b)(2) applies to relators, then this Court should rewrite that subsection to end with "or by the relator when the Government declines to intervene." Congress could have added these words, but it did not. And, to be clear, such a wholesale rewrite of the statutory

language is the only way to achieve the result Petitioners urge. That is because Petitioners' selective version of the "stand in the shoes" rationale, Pet'rs' Br. 41, does not render relators and the Government interchangeable all of the time, but rather only in declined suits. The plain language—Congress's deliberate choice—should govern.

Turning to this plain language, three phrases in the relevant provision establish its meaning. First, (b)(2)'s discovery-based rule is triggered on the knowledge of "the official of the United States." 31 U.S.C. § 3731(b)(2). Many have concluded—based on the legislative history and actual practice—that this official is limited to the Attorney General (and his delegates). *See* Hesch Br. at 6–7 & n.7 (collecting authorities); *see also* S. Rep. No. 99-345, at 30 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5295 (stating that "[t]he statute of limitations does not begin to run until the material facts are known by an official within *the Department of Justice* with the authority to act in the circumstances") (emphasis added). Although the phrase "Department of Justice" was removed from the final version, that hardly means Congress decided to extend the language so broadly to include private relators who are not employed by the Government. Notably, Congress retained the specific terminology "official of the United States," as opposed to the generic term "government" or "United States" that it used elsewhere in the FCA. As shown above, *see supra* I.B.1, Congress used those latter terms in specific ways, some of which included relators and some that did not. An "official of

the United States" is yet another distinct concept, which indicates Congress intended something different here.

Second, and relatedly, section (b)(2) further qualified what type of "official of the United States" had the requisite knowledge: only one "*charged with responsibility to act*," 31 U.S.C. § 3731(b)(2) (emphasis added). The plain meaning of the term "charged" encompasses one who has been "entrusted" with the obligation to affirmatively perform some action. *See Charge*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To entrust with responsibilities or duties."); *Charge*, OXFORD ENGLISH DICTIONARY 13.c (2d ed.) ("impos[ing] a duty, task, or responsibility upon" and "lay[ing] a command or injunction upon").

Likewise, § 3731(b)(2) triggers the limitations period based on the knowledge of the person who has a "responsibility to act." The word "responsibility" carries with it the concept of accountability or institutional hierarchy—that one who fails to carry out an assigned task must answer to whoever assigned the work. *Responsibility*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("That for which one is answerable or accountable; a trust, duty, or obligation."). For this reason, Petitioners' reliance on dictionary definitions of "official" and the definition of "public official" in the federal bribery statute, *see* Pet'rs' Br. 41 (citing 18 U.S.C. § 201(a)(1)), actually undermines their position. As those definitions reflect, they encompass only those who have been actively appointed to carry out a program or initiative for the Government.

The unique relationship between a *qui tam* relator and the Government in the context of a legal action does not accord with Petitioners' conception of "official." *See supra* Section I.B.1. The two often proceed in tandem through the lawsuit, and the Government always retains the ability to control the litigation. *See, e.g.*, 31 U.S.C. § 3730(c) (giving the Government the right to intervene, to dismiss the case over the relator's objection, and to intervene at a later date). In fact, Congress assigned the Government—and only the Government—duties that it cannot delegate to the relator. *See* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."). And the Attorney General charged with pursuing the case has an obligation to "take care that the laws be faithfully executed" or face repercussions. U.S. Const. Art. II, § 3.

Thus, the mere fact of declining does not necessarily indicate that the Government has—or could—affirmatively appoint the relator to take its place. The Government might decline initially because the district court has refused to grant it the extensions it needs to "diligently investigate" under § 3729, but it can always continue its investigation and intervene later, § 3730(c). If the Government lacks the resources to ensure that the FCA is "faithfully executed," it may opt to decline, again with the option of intervening later. Neither of these scenarios displays the intent to appoint the relator, per Pet'rs' Br. 41, a "public official."

Third and finally, the FCA temporally limits this responsibility to act: "in the circumstances." 31 U.S.C.

§ 3731(b)(2). The only relevant circumstances in this context are the investigation and then the filing, intervening, or declining of the suit. But under Petitioners' approach, those circumstances would have come and gone by the time a relator assumes this role. The "springing" limitations problem identified above, *see supra* Section I.B.2., would apply equally here. Thus, far from "giving effect" to "default rules" regarding statutes of limitations and the "purposes animating" tolling rules, Pet'rs' Br. 42, Petitioners actively undermine them.

Other FCA provisions make sense only if the "official of the United States charged with responsibility to act" excludes relators. Section 3729(a)(2), for example, states that "[i]f the court finds that the person committing the violation of this subsection furnished *officials of the United States responsible for investigating* false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information," the damages to which that person is subjected are reduced. If this provision referred to the relator, it would lead to the quizzical result that an employer who tells an employee about a fraud would be liable for fewer damages if that employee later decided to become a relator. Congress could not have intended to retroactively confer the benefit of this cooperation provision on a fraudster who merely revealed this information to an employee who later happened to become the relator. Because § 3731(b)(2) uses the same phrase as § 3729(a)(2)—"official of the United States"—it should be taken in a similar vein. *See Envtl. Def. v.*

Duke Energy Corp., 549 U.S. 561, 584 (2007) (noting the "presumption that the same words repeated in different parts of the same statute have the same meaning") (Thomas, J., concurring).

Petitioners' argument, Pet'rs' Br. at 42–43, and the cases that have construed subsection (b)(2) to act as an equitable tolling provision, *see, e.g.*, *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996), undermine Congress's explicit purpose in enacting the 1986 Amendments: to reach and combat even more cases of fraud. *Hyatt* read in a limiting provision that would prevent relators from bringing otherwise meritorious claims—in effect, creating an equitable *un*tolling provision that bars a claim based on the relator's knowledge when the plain language of the statute otherwise would permit it. *Contra Equitable Tolling*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining equitable tolling as the "doctrine that the statute of limitations will not *bar* a claim if the plaintiff . . . did not discover the injury until after the limitations period had *expired*. . . .") (emphasis added).

Finally, coming full circle, Petitioners again complain of "counterintuitive results" that would arise from enforcing the statute as written. Pet'rs' Br. 45; *see also id.* at 44 (discussing "highly anomalous" outcomes). As set forth extensively above, *see supra* Section I.B.1., these so-called anomalies exist only because Petitioners divorce them from the FCA's purposes and the safeguards Congress selected to ensure that prospective relators would not engage in contumacious delay.

Similarly, Petitioners' intimation that adopting any view but theirs would reward dilatory relators and punish diligent ones ignores the many incentives that Congress built into the Act to prevent such results. *See* 31 U.S.C. § 3730(b)(5), (e)(4)(A)–(B). Putting aside these built-in statutory safeguards, Petitioners' solution would not remedy their own imagined problems. So long as the Government *may* intervene, relators could theoretically dally to bank larger recoveries. Then, they would not be equitably "untolled" if they won the Government-intervention lottery. In short, Petitioners' proposed solution—which turns on the Government's declining or intervening—arises well after a relator's timing decisions are made; it would not deter the delay of which they complain. Nor do the Petitioners address the greater likelihood of Government dallying. In either event, so long as suit is brought within ten years, stolen funds can be recouped.

Regardless, in invoking these "counterintuitive results," Petitioners, once again, do not claim statutory ambiguity, nor do they expressly invoke the absurdity or congressional impossibility exceptions to unambiguous language. *See supra* Section I.A. Instead, they simply insist that their preferred result is "compelled by the broader statutory context." Pet'rs' Br. 40. The same reasons provided above, *see supra* Section I.A., apply with equal force here: the Court should not interfere with Congress's unambiguous statutory language.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

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No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

This Court has already held that the very text respondent declares "plain" and "unambiguous," Resp. Br. 16, is in fact "imprecise[ ]" and "inexact." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418, 422 (2005). Respondent and the United States nonetheless rely on hyper-literal textual arguments that ignore the statutory context, purpose, and history that *Graham* makes clear are essential tools when interpreting Section 3731(b)(2).

Respondent's narrow focus on the "civil action under Section 3730" language disregards other language in Section 3731(b)(2) demonstrating that the provision is not available when the United States has declined to intervene, including the language that links the start of that limitations period to the knowledge of "the official of the United States charged with responsibility to act in the circumstances," 31 U.S.C. § 3731(b)(2)—language that is inapplicable where the United States has not intervened because no United States official has responsibility to act "in [those] circumstances."

The United States fares no better in essentially pinning its entire argument on a single passage from *Graham*, which the United States claims "construed the phrase 'civil action under section 3730' in Section 3731(b)" to encompass non-intervened actions. U.S. Br. 9. But the language from *Graham* expressly refers to *"§ 3731(b)(1)'s* text," not to Section 3731(b)(2). 545 U.S. at 421 (emphasis added). And where, as here, the same statutory language appears in two different provisions of a statute, there is

nothing unusual or improper about giving that language different meanings based on differing context. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

By eschewing the holistic interpretive approach mandated by *Graham*, respondent creates a host of counterintuitive results that he then strives unsuccessfully to minimize. For example, in response to petitioners' showing that the availability of Section 3731(b)(2) in non-intervened actions could enable relators to wait ten years before filing suit without ever notifying the government of the alleged fraud, respondent declares that "[i]n no situation should (b)(2) apply when suit precedes knowledge" by the government—an invented limitation that finds no basis in the text of the statute or any prior decision from any court. Resp. Br. 32.

Respondent and the United States rely on the same flawed approach to statutory interpretation in responding to petitioners' alternative argument that, if Section 3731(b)(2) is available in non-intervened actions, it is the knowledge of the relator that triggers the three-year limitations period. If Section 3731(b)(2) is available where the United States has not intervened, this is the only reading of the statute that comports with this Court's description of a relator as a "statutorily designated agent of the United States" with respect to the portion of the recovery paid to the government, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), and the only reading that would ameliorate the congressionally unintended consequences that would otherwise result from making Section 3731(b)(2) available in non-intervened actions, such as giving relators longer to sue than the government in some settings

where they are similarly situated. In contrast, the supposedly "bizarre result[ ]" that the United States decries (at 11)—a relator being permitted to sue where he has learned of the fraud several years after the government decided not to file suit—is not bizarre at all; it is completely consistent with the False Claims Act's goal of facilitating recovery for fraud against the government.

Ultimately, the reading of Section 3731(b)(2) advanced by respondent and the United States may have superficial appeal when "civil action under Section 3730" is "viewed in isolation." *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (internal quotation marks omitted). But *Graham*—and the settled principles of statutory construction on which it rests—demand more. Section 3731(b)(2) must be "read in its proper context," in light of default limitation rules, and in a manner that minimizes congressionally unintended, "counterintuitive results." *Graham*, 545 U.S. at 415, 421. Doing so demonstrates that the Eleventh Circuit's interpretation of Section 3731(b)(2) is untenable and that Congress never intended to permit respondent to pursue this claim after waiting seven years to file suit.

I. SECTION 3731(B)(2) IS INAPPLICABLE IN NON-INTERVENED ACTIONS.

Respondent and his *amici* ignore the powerful textual evidence and other interpretive indicia demonstrating that Section 3731(b)(2) is available only where the United States files suit or has intervened in a relator-initiated action.

A. When "Read In Its Proper Context," The Text Of Section 3731(b)(2) Establishes That It Applies Only When The United States Is A Party.

Section 3730 authorizes two types of litigants—the government and relators—to bring False Claims Act suits, but Section 3731(b)(2) refers to only one of them: "the official of the United States charged with responsibility to act in the circumstances." According to respondent and the United States, Section 3731(b)(2) is nevertheless broad enough to encompass non-intervened suits in which the United States is not a party because the provision applies to "civil action[s] under section 3730" and this Court supposedly determined in *Graham* that "Government and relator suits are such 'civil actions.'" Resp. Br. 17; *see also* U.S. Br. 15.

But *Graham* never *once* mentions Section 3731(b)(2). In fact, the language from *Graham* repeatedly invoked by the United States (at 9, 15)—"'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions," 545 U.S. at 421–22—is expressly limited to "§ 3731(b)(1)'s text," *id.* at 421.

Although a non-intervened suit under Section 3730(b) is a "civil action under section 3730" in Section 3731(b)(1), when that language is "read in its proper context" in Section 3731(b)(2), *Graham*, 545 U.S. at 415, it is apparent that the language does not extend to non-intervened actions. "The specific language in the statute bears this out." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). "When the government declines to intervene," U.S. Br. 14, there is no "official of

the United States charged with responsibility to act in the circumstances" within the meaning of Section 3731(b)(2) because the United States is not a party to the case and "government officials are certainly not 'charged with responsibility' to ensure that a relator brings a timely [False Claims Act] action." *Sanders*, 546 F.3d at 294; *see also* Chamber Br. 7–8.

Without acknowledging as much, respondent and the United States are reading Section 3731(b)(2) as if it applied to the official "charged with responsibility to act [or to decline to act] in the circumstances." *See* U.S. Br. 27 ("'act[ing] in the circumstances" is "determining the appropriate governmental response to evidence of FCA violations"). But that is not the statute that Congress wrote. *See Graham*, 545 U.S. at 417 (rejecting reading of Section 3731(b)(1) that would have required reading in "'[suspected or actual]'" before "'violation'"). It instead replicated the language of 28 U.S.C. § 2416(c)—a limitations provision that indisputably applies only to suits filed by the government—which ties the limitations period to the knowledge of "an official of the United States charged with the responsibility to act in the circumstances." As in Section 2416(c), a government official "act[s] in the circumstances" addressed in Section 3731(b)(2) by filing a complaint (either a case-initiating complaint or a complaint-in-intervention). *See Sanders*, 546 F.3d at 294 ("it is doubtful that the government official 'charged with responsibility to act in the circumstances' could be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period"). Section 3731(b)(2) is therefore inapplicable to non-intervened suits because there is no "official of the United States" who has acted and whose knowledge can serve as the trigger for the statute of limitations.

This interpretation of "civil action under section 3730" is consistent with the principle that "the 'same . . . provision' of a statute cannot 'bear[ ] two different meanings' at the same time." U.S. Br. 17 (quoting *Clark v. Martinez*, 543 U.S. 371, 380, 383 (2005)) (emphasis omitted). While "civil action under section 3730" appears only once in Section 3730(b), it is part of two different limitations provisions. As *Graham* indicates, the language effectively appears in *both* Section 3731(b)(1) and Section 3731(b)(2). In fact, *Graham* repeatedly stated that the "civil action under section 3730" language is part of Section 3731(b)(1). *See, e.g.*, 545 U.S. at 416 ("§ 3731(b)(1)'s language . . . assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729'") (alterations in original). The language is likewise part of Section 3731(b)(2). There is nothing improper about giving that language different meanings in different statutory contexts. *See Envtl. Def.*, 549 U.S. at 574. This holds true whether the language appears once, or multiple times, in the statute. *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989) (a state officer sued in his official capacity is not a "person" under 42 U.S.C. § 1983 when the suit seeks money damages but is a "person" when the action seeks injunctive relief).

Indeed, the United States does not dispute that, as this Court explained in *Graham*, Congress used the phrase "action brought under section 3730" in Section 3731(d) to refer to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party," 545 U.S. at 418—which is precisely the definition that petitioners are advocating in Section 3731(b)(2). Thus, even the United States recognizes that this language can

have different meanings in different parts of Section 3731.[1]

These textual cues—the fact that "civil action under section 3730" is effectively incorporated into two different subsections of Section 3731 and Congress's use of the same language in another provision of Section 3731 to convey the same meaning petitioners urge here—demonstrate that Congress intended to limit Section 3731(b)(2) to suits in which the United States is a party.

B. Default Tolling Rules Support Restricting Section 3731(b)(2) To Suits In Which The United States Is A Party.

Default tolling rules confirm that petitioners' reading of Section 3731(b)(2) is "the better way to resolve th[e] ambiguity" created by Congress's "imprecise[ ]" drafting. *Graham*, 545 U.S. at 417, 418. Congress enacted Section 3731(b)(2) against the backdrop of the well-established principle that, where a limitations period is tolled based on fraudulent concealment, it begins to run when *the party entitled to file suit* learns, or should have learned, the material facts—not when a third party (such as the government in a non-intervened suit) does. *See* Pet. Br. 22–26.

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[1] Respondent takes a contrary tack, arguing—in direct contravention of the plain language of Section 3731(d) and this Court's decision in *Graham*—that, "[i]n choosing to name the 'United States' [in Section 3731(d)], Congress was *not* distinguishing between relators and the Government." Resp. Br. 29 (emphasis added). That respondent felt it necessary to resort to this atextual, illogical reading of Section 3731(d) is a powerful indication of the damage this provision does to respondent's reading of Section 3731(b)(2).

Respondent offers two equally unpersuasive rejoinders. First, he asserts that it is actually the "victim's" knowledge—not the plaintiff's knowledge—that generally matters for tolling purposes, and, here, the government is the victim of the alleged False Claims Act violation. Resp. Br. 35, 39–40. But respondent cites no case law supporting his reimagined version of this default tolling rule; in fact, settled law is to the contrary. *See, e.g.*, *Chao v. Va. Dep't of Transp.*, 291 F.3d 276, 283–84 (4th Cir. 2002) (holding that the government was not entitled to equitable tolling where it had failed to file suit diligently even though the employees on whose behalf the FLSA suit was filed had been diligent). Nor does he identify any common-law rule that would support allowing relators to sleep on their rights for up to ten years as long as they—along with the perpetrator of the fraud—continue to conceal the fraud from the government. That outcome is fundamentally incompatible with the principles of equitable tolling, which require would-be plaintiffs to "demonstrate that they have been diligent in pursuit of their claims," *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1808 (2018), as well as with the False Claims Act's objective of "encouraging *prompt* action on the part of relators." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (emphasis added). It also ignores the fact that Section 3731(b)(1) already provides relators with a "relatively long" six-year statute of limitations that is more generous than many other fraud limitations periods. *Graham*, 545 U.S. at 427–28 (Breyer, J., dissenting).[2]

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[2] *See, e.g.*, 15 U.S.C. § 77m ("No action [for making false statements or material omissions to investors in offering materials]

Second, respondent argues that petitioners' reading of Section 3731(b)(2) violates a different default rule requiring that statutes of limitations "be read to promote predictability and certainty" because the availability of Section 3731(b)(2) would not be known until the government makes its intervention decision. Resp. Br. 35. But the predictability and certainty provided by a statute of limitations "are primarily designed to assure fairness to defendants" by protecting them from stale claims, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965), not to guarantee that the timeliness of a claim will be readily ascertainable when suit is filed.

To the contrary, questions about the timeliness of a claim often persist throughout a case. For example, the parties may dispute which statute of limitations applies to a particular claim, whether that limitations period is subject to tolling, and when the relevant facts became known to the plaintiff. Congress has not even supplied a limitations period for a number of federal statutes, despite the substantial uncertainty that is occasioned by courts' efforts to identify the most analogous state (or occasionally, federal) limitations period to apply. *See Graham*, 545 U.S. at 421 n.3 (listing "likely candidates for analogous state statutes of

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shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and "[i]n no event" may the action be brought "more than three years after the security was bona fide offered to the public."); 28 U.S.C. § 1658(b) ("[A] private right of action that involves a claim of fraud . . . in contravention of a regulatory requirement concerning the [federal] securities laws . . . may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.").

limitations" for a False Claims Act retaliation claim while emphasizing that the list "may well not be . . . exhaustive or authoritative").

Even after the applicable limitations period is identified, uncertainty over whether a suit is timely may persist for years until the facts are sufficiently developed to resolve the issue on summary judgment or at trial. In this case, for example, the Eleventh Circuit did not "conclude[ ]," as respondent suggests, "that [his] suit was timely," Resp. Br. 15, but held "only that at the motion to dismiss stage it was error to dismiss the complaint," Pet. App. 31a n.12. The court underscored that, "if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, [respondent's] claims could still be barred by the statute of limitations." *Id.*

Any additional uncertainty occasioned by a decision limiting the availability of Section 3731(b)(2) to suits in which the United States is a party would be minimal. If a relator files a suit that would be untimely unless Section 3731(b)(2) is available, the United States will have the opportunity to intervene at the outset of the case and thereby render the claim timely. But if the United States decides that the case is not sufficiently meritorious to warrant intervention, or declines to intervene for any other reason, then the defendant will be able to secure prompt dismissal on limitations grounds. Respondent's "specter of a springing statute of limitations" interrupting the

case after it is "well along" is thus purely apocryphal. Resp. Br. 38.[3]

C. Respondent Fails To Negate The Counterintuitive Results Of His Interpretation Of Section 3731(b)(2).

Respondent strains to counter petitioners' showing that his interpretation of Section 3731(b)(2) would lead to the same kinds of "counterintuitive results" that troubled this Court in *Graham*, 545 U.S. at 421, and simultaneously attempts to invent other counterintuitive outcomes that would supposedly result from petitioners' interpretation. Both efforts fail.

First, neither respondent nor the United States disputes that their reading of Section 3731(b)(2) would give relators a *longer* limitations period than the government in some scenarios where the two are similarly situated, *see* Pet. Br. 26–27, which is inconsistent with respondent's own view that the False Claims Act "puts relators on the *same* statute of limitations footing as the Government." Resp. Br. 27 (emphasis added). That preferential treatment for relators is also inconsistent with the fact that Congress

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[3] Accordingly, petitioners' reading of Section 3731(b)(2) would not create the kind of "'jurisprudential limbo'" that this Court has sought to avoid in other settings where a plaintiff attempted to extend the limitations period retroactively based on developments the defendant could not have foreseen. *See* Resp. Br. 37 (quoting *Wallace v. Kato*, 549 U.S. 384, 395 (2007) (rejecting a proposed rule that would have tolled the limitations period on a Section 1983 action between the date of the plaintiff's conviction and the date the conviction was overturned because "a statute that becomes retroactively extended" would deprive defendants of "notice to preserve beyond the normal limitations period evidence that will be needed for their defense")).

enacted Section 3731(b)(2) to address unique obstacles that *the government* faces when trying to investigate and prepare a False Claims Act complaint within the six-year limitations period, *see* Pet. Br. 35–36, as well as Congress's decision repeatedly to afford the government *greater* rights than relators under the False Claims Act. *See, e.g.*, 31 U.S.C. § 3730(c)(2)(A)–(D) (government may dismiss or settle a relator-initiated suit over the relator's objection, and court may limit relator's participation on an appropriate showing by either the government or the defendant). Giving relators longer to sue than the government makes no sense in light of the False Claims Act's purpose and history.

Second, by affording relators up to ten years to sue (as long as they keep the government in the dark about the fraud), respondent's interpretation would prolong the very fraud that the False Claims Act is designed to root out and complicate the government's ability to recover in cases where the passage of time may have resulted in the loss of evidence. Respondent goes to great lengths to avoid this inexplicable outcome by arguing that "no relator who learned about the fraud and waited ten years to file without telling the Government could use (b)(2)." Resp. Br. 31. But there is simply nothing in the plain language of Section 3731(b)(2) that supports respondent's *ipse dixit*. If a relator files suit exactly ten years after a violation that was unknown to the government and the government subsequently declines to intervene, then the suit would be timely (assuming that Section 3731(b)(2) is available in non-intervened actions and is triggered by the government's knowledge) because (1) the suit would not be filed "more than 10 years after the date on which the violation is committed," and (2) the action would not be brought "more than 3 years after the

date" when the government learned the material facts. 31 U.S.C. § 3731(b)(2).

Not surprisingly, respondent fails to cite even a single case supporting his effort to read a third requirement—"suit may not be filed by a relator before the relator informs the government of the alleged violation"—into Section 3731(b)(2). The relevant case law is to the contrary. *See, e.g., United States ex rel. Salmeron v. Enter. Recovery Sys., Inc.*, 464 F. Supp. 2d 766, 769 (N.D. Ill. 2006). And even if the relator does inform the government of the fraud shortly before filing suit on the cusp of the ten-year limitations mark, the government will be left with little time to investigate the claim and prepare its own complaint—thereby nullifying the very purpose of the 1986 amendments to Section 3731(b), which were intended to "give [the government]" more time and "flexibility" where it learned of the fraud shortly before the expiration of the then-exclusive six-year limitations period. *Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Assistant Attorney General Richard K. Willard).

Respondent and the United States also attempt to defuse the incentives for delay created by the availability of Section 3731(b)(2) in non-intervened actions by pointing to other features of the False Claims Act that would supposedly incentivize relators to file suit promptly, such as the first-to-file and public-disclosure bars. *See* Resp. Br. 53; U.S. Br. 25. But the ineffectiveness of those measures is underscored by the facts of this case, where respondent claims that he "was the *only* witness to th[e] forgery" allegedly undertaken to effectuate a bid-rigging scheme. Resp.

Br. 11 (emphasis added). As the lone witness, respondent faced little risk that someone else would beat him to the courthouse or that the allegations would be publicly disclosed, and he therefore apparently felt sufficiently comfortable to wait a full *seven years* to file suit.

This fact pattern is hardly an outlier. Relators are often "close observers or otherwise involved in the fraudulent activity," S. Rep. No. 99-345, at 4 (1986), which means that they are well-situated to gauge whether others possess the requisite knowledge to bring a False Claims Act action and whether they will be able to preserve evidence to facilitate "carry[ing] [their] burden of proof" years after the fact, U.S. Br. 26, when the defendant's ability to identify relevant evidence and witnesses may be severely hampered. Relators are thus uniquely positioned to weigh the costs and benefits of filing suit promptly or instead seeking to maximize the treble damages recoverable from any ongoing fraud by delaying suit up to ten years—exacerbating the already-substantial litigation burdens for False Claims Act defendants. *See* Chamber Br. 15–19.[4]

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[4] In response to petitioners' showing (at 31–32) that delay was not among the factors Congress originally contemplated would reduce a relator's financial recovery—and that the possibility of a reduced recovery thus sheds no light on Congress's intent when enacting Section 3731(b)(2)—respondent counters that courts accounted for delay when determining relators' shares "[w]ell before" 1996, when the Department of Justice included this factor in its guidelines. Resp. Br. 54. But, in support, respondent cites only a district court opinion that was issued six years *after* the 1986 False Claims Act amendments and that is therefore no more probative of Congress's intent in 1986 than the 1996 De-

Third, respondent and the United States downplay the burden that would be imposed on the government when it is subjected to discovery into its knowledge of the alleged fraud in non-intervened actions. Resp. Br. 37; U.S. Br. 26. The United States' expression of willingness to shoulder these burdens in its brief does not diminish the fact that, when Congress enacted the 1986 amendments to the False Claims Act, it is very unlikely that it would have wanted to burden the government with intrusive discovery into questions about when the relevant officials knew or should have known about alleged fraud in cases that the government has determined to be unworthy of the resources necessary for intervention. After all, Congress enacted the 1986 amendments to make it easier for the government to recover where it has been the victim of fraud, not to saddle the government with new burdens in suits of questionable merit. *See, e.g.*, S. Rep. No. 99-345, at 1 ("The purpose of [the 1986 amendments] is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.").

Finally, respondent also attempts to manufacture counterintuitive consequences that would supposedly result from petitioners' position, arguing that petitioners' reading of Section 3731(b)(2) would render the

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partment of Justice guidelines. *Id.* Nor did that court even attempt to divine Congress's intent when enacting the 1986 amendments. *See United States v. Gen. Elec.*, 808 F. Supp. 580 (S.D. Ohio 1992). Moreover, it only reduced the relator's share of the award from 25% to 22.5%—despite the fact that the relator "was aware of the fraud long before he filed his complaint . . . [and] his silence facilitated the continuation of the fraud"—which is hardly a strong disincentive for delay. *Id.* at 584.

relation-back provision in Section 3731(c) "superfluous." Resp. Br. 33. But respondent's own hypothetical belies that argument. If, as respondent posits, the government learns of the fraud in year five, a relator sues in year seven, and the government intervenes in year nine (after requesting multiple extensions of the 60-day intervention period, as is not uncommon, *see* WLF Br. 13; J.A. 6a–7a), then the government would be required to rely on Section 3731(c), which provides that the "Government['s] pleading shall relate back to the filing date of the [relator's] complaint," to establish that its complaint was timely under Section 3731(b)(2). The relation-back provision would thus continue to have force if Section 3731(b)(2) is unavailable in non-intervened actions because it would be implicated whenever the government files its complaint in intervention more than three years after learning of the fraud and more than six years after the violation.

D. The Legislative History Refutes Respondent's Reading Of Section 3731(b)(2).

The legislative history confirms that Congress enacted Section 3731(b)(2) "to permit the *Government*"—not relators in non-intervened actions where the United States is not a party—"to bring an action . . . within 3 years of when the Government learned of a violation." S. Rep. No. 99-345, at 15 (emphasis added).

According to respondent, "[p]etitioners provide no reason that Congress would have wanted to bar relators" from invoking Section 3731(b)(2) in non-intervened actions. Resp. Br. 47. But Congress emphasized that relators are generally well-positioned to discover fraud based on their "close" proximity to the conduct. S. Rep. No. 99-345, at 4. The considerations

that militated in favor of affording the United States additional time to discover the fraud and file suit—the government's difficulty in "piec[ing] together" the fraud, H.R. Rep. No. 99-660, at 26 (1986)—are therefore inapplicable to relators. In fact, Congress designed the False Claims Act to "achieve *rapid* exposure of fraud" by relators, *Sikkenga*, 472 F.3d at 725—a goal that would be undermined by the availability of a limitations provision that permits relators to wait up to ten years before filing suit without ever alerting the government to their allegations.[5]

Respondent also emphasizes that Congress never "actually address[ed] (b)(2)'s applicability to *relators*," Resp. Br. 48, which is precisely the point: Congress was informed by the Department of Justice that Section 3731(b)(2) was necessary to remedy a government-specific problem arising from its frequent inability to investigate fraud and prepare a complaint within the then-exclusive six-year limitations period because the government often received no notice of the fraud until that period had nearly expired. *See* Pet. Br. 36. If the Department of Justice had felt that relators were encountering the same problem—and should likewise be afforded additional time to file suit

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[5] Respondent argues that the Tenth Circuit's focus on "rapid exposure" by relators misreads the legislative history, which supposedly emphasizes "not promptness, but rather, effectiveness." Resp. Br. 51 (citing *Sikkenga*, 472 F.3d at 725). But the same excerpt of legislative history quoted by respondent (at 50 n.7) expressly refers to "Government delay in fraud cases," S. Rep. No. 99-345, at 11, and the decision from this Court that the Senate Report expressly invokes explains that, under the False Claims Act, "large rewards were offered to stimulate actions by private parties should the prosecuting officers be *tardy in bringing the suits*." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943) (emphasis added).

based on the date the fraud was discovered—it presumably would have said exactly that to Congress. But the legislative history does not offer a hint of any such concern on behalf of the Department of Justice or Congress.

Indeed, Congress did not simply overlook relators when it enacted the 1986 amendments. As respondent emphasizes (at 46), those amendments included many "[r]elator-targeted reforms." But all of the relevant interpretive tools—including Congress's decision to use language drawn directly from the government-specific statute of limitations in 28 U.S.C. § 2416(c)—make clear that Section 3731(b)(2) is a *government*-targeted reform.

II. If Section 3731(b)(2) Is Applicable In Non-Intervened Actions, Then The Relator Is The "Official Of The United States Charged With Responsibility To Act."

Although Section 3731(b)(2)'s "imprecise[ ]" text does not expressly mention relators, *Graham*, 545 U.S. at 418, the context of this "idiosyncratic" and "unique" statute, U.S. Br. 31; Resp. Br. 59, demonstrates that the relator is the "official of the United States charged with responsibility to act in the circumstances" in the event that Section 3731(b)(2) can be invoked in non-intervened actions. Thus, if Section 3731(b)(2) is available here, its limitations period was triggered when respondent learned of the alleged fraud seven years before he filed suit.

Respondent and the United States ignore the broader statutory context and resort to the formalistic view that relators cannot be "official[s] of the United States" for purposes of Section 3731(b)(2) because relators are not "appointed" or "employed by the

United States." U.S. Br. 28; *see also* Resp. Br. 57.[6] But they ignore the many dictionary definitions establishing that the term "official" is sufficiently capacious to include a person "authorized to act for a government," *Webster's Third New Int'l Dictionary* 1567 (2002); *see also* Pet. Br. 41 n.8, and neither has any response to this Court's decision in *Dixson v. United States*, 465 U.S. 482 (1984), where officers of a private corporation who were not appointed or employed by the United States were nevertheless held to be "public officials" because they possessed a "degree of official responsibility for carrying out a federal program" of community-development block grants. *Id.* at 499.

When relators pursue a False Claims Act suit in a non-intervened action they have a similar "degree of official responsibility" because, as respondent acknowledges, they "'stand in the government's shoes' for suit-bringing purposes." Resp. Br. 44 (capitalization altered). A relator brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, in seeking to recover damages for the government, acts as a "statutorily designated agent of the United States," *Stevens*, 529 U.S. at 772; *see also Hyatt*, 91 F.3d at 1217 n.8 ("The [False Claims Act] deputizes private individuals to act to protect the interests of the United States.").

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[6] While the United States is dismissive of petitioners' position in this case, it displayed far less certainty on this question in *Graham*, where it stated that the answer was "not clear" and cited cases on both sides of the issue, including the Ninth Circuit's decision in *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), which it described as holding that a private "employee is an 'official of the United States' when suing as a relator because Section 3730(b) authorizes the individual to bring suit on behalf of the United States." U.S. Br. 18 n.6, *Graham*, No. 04-169.

If Congress had intended to limit the term "official" to encompass only the Attorney General and his delegates, *see* Resp. Br. 57; U.S. Br. 27–28, Congress could have done so explicitly, as it did in other sections of the False Claims Act that expressly refer to the "Attorney General," *see, e.g.*, 31 U.S.C. § 3730(a). In fact, Congress contemplated using the narrower phrase "an official within the Department of Justice" in Section 3731(b)(2) but ultimately opted for the broader term "official of the United States," *see* S. Rep. No. 99-345, at 30—two years *after* this Court had broadly construed the term "official" in *Dixson* to reach private parties carrying out public responsibilities. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (citing "presumption that Congress is aware of settled judicial and administrative interpretations of terms when it enacts a statute") (internal quotation marks and alteration omitted).

Congress's use of "officials of the United States" elsewhere in the False Claims Act to refer only to government employees does not override these other indications that Congress used the phrase in Section 3731(b)(2) to encompass relators in non-intervened actions. As respondent and the United States emphasize, Resp. Br. 60; U.S. Br. 29, there can be no doubt that "officials of the United States responsible for investigating false claims" refers only to government employees in Section 3729(a)(2)(A)—but that is because the False Claims Act elsewhere expressly states that the *Attorney General* is responsible for "diligently . . . investigat[ing]" alleged False Claims Act violations. 31 U.S.C. § 3730(a). As used in Section 3731(b)(2), however, the meaning of "official of the United States" is informed by a different provision

of the False Claims Act, Section 3730(c)(3), which provides that, where the government does not intervene, "the person who initiated the action shall have the right to conduct the action." *Id.* § 3730(c)(3). Thus, "in th[ose] circumstances," it is the relator who is "the official of the United States charged with responsibility" to act. And while the United States is correct that "[n]othing in the" False Claims Act "*require[s]* such a person to commence a qui tam suit," U.S. Br. 28, nothing requires the government to file a False Claims Act suit, either. Indeed, there are many reasons that the government may elect not to file a False Claims Act complaint even where it believes that a violation has occurred. But, where the government does file suit or intervene in an action, the relevant government employee is "charged with responsibility to act in the circumstances," just as the relator shoulders that same "responsibility" where the government declines to intervene.

Respondent and the United States do not dispute that deeming the relator to be the relevant "official of the United States" in non-intervened actions would ameliorate many of the counterintuitive results that would otherwise be attributable to the availability of Section 3731(b)(2) in such suits—including by linking the limitations period to the knowledge of a party (the relator) rather than a nonparty (the government), eliminating relators' incentive to keep the government in the dark about the alleged fraud and wait ten years before filing suit, and ensuring that relators do not enjoy longer limitations periods than the government in some circumstances. *See* Pet. Br. 45–46; *Hyatt*, 91 F.3d at 1218. The United States instead points to its own supposedly counterintuitive scenario that could result from petitioners' position—one in which the government's suit is time-barred but the relator's

suit is not because "the government learn[ed] of a fraud *first*." U.S. Br. 29. But permitting the relator to proceed in that scenario—rather than deeming both suits to be time-barred, which is the outcome the United States advocates—promotes the False Claims Act's objective of facilitating the "Government's ability to recover losses sustained as a result of fraud." S. Rep. No. 99-345, at 1. If given the choice between no recovery at all and recovery in a relator-litigated suit, there is no doubt that the Congress that enacted the 1986 amendments would have chosen recovery.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 18-315

In the Supreme Court of the United States

COCHISE CONSULTANCY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BILLY JOE HUNT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The False Claims Act, 31 U.S.C. 3729 *et seq.*, contains a six-year statute of limitations and a tolling provision for any "civil action under section 3730." 31 U.S.C. 3731(b). The tolling provision permits a suit to be brought within three years after "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. 3731(b)(2). The questions presented are as follows:

1. Whether the tolling provision in 31 U.S.C. 3731(b)(2) applies to a civil action brought by a private relator under 31 U.S.C. 3730(b) when the United States elects not to intervene in the action.

2. Whether, for purposes of 31 U.S.C. 3731(b)(2), a private relator is "the official of the United States charged with responsibility to act under the circumstances" when the United States elects not to intervene.

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In the Supreme Court of the United States

No. 18-315

COCHISE CONSULTANCY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BILLY JOE HUNT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents important questions concerning the time limits for bringing a civil action under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. The United States has a substantial interest in the proper interpretation of the Act's time limits for bringing suit.

STATEMENT

1. The FCA "has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (1986 Senate Report). The Act imposes civil liability for a variety of deceptive practices involving government funds and property. See 31 U.S.C.

3729(a)(1). A person who violates the Act is liable to the United States for civil penalties plus three times the amount of the government's damages. *Ibid.*

a. A civil action alleging a violation of Section 3729 may be commenced in either of two ways. First, the government may bring a civil action against the alleged violator. 31 U.S.C. 3730(a). Second, a private person (known as a relator) may bring a qui tam civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). In that event, "[t]he action shall be brought in the name of the Government." *Ibid.*

When a relator brings a civil action under Section 3730(b), the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). In addition to filing the complaint under seal, the relator must serve on the government a copy of the complaint and any supporting evidence. *Ibid.* Within 60 days after receiving the complaint and supporting evidence, the government may "intervene and proceed with the action," *ibid.*, "in which case the action shall be conducted by the Government," 31 U.S.C. 3730(b)(4)(A). Alternatively, the government may "notify the court that it declines to take over the action." 31 U.S.C. 3730(b)(4)(B). If the government declines to intervene, the relator has the right to conduct the action. See 31 U.S.C. 3730(b)(4)(B), (b)(5), and (c)(3). But the government is entitled to be served with copies of all pleadings upon request and may intervene at any time with good cause. 31 U.S.C. 3730(c)(3).

If the government intervenes in a civil action brought by a relator under Section 3730(b), the relator is generally entitled to between 15% and 25% of any monetary recovery. 31 U.S.C. 3730(d)(1). If the gov-

ernment declines to intervene and the relator successfully prosecutes the action, the relator receives between 25% and 30% of the recovery. 31 U.S.C. 3730(d)(2).

b. The FCA was enacted in 1863 to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)). The Act originally contained a six-year statute of limitations. Act of Mar. 2, 1863, ch. 67, § 7, 12 Stat. 698; see 31 U.S.C. 3731(b) (1982).

In the course of making significant amendments to the Act in 1986, Congress heard evidence that the six-year limitations period sometimes allowed wrongdoers to escape liability because their frauds remained concealed or otherwise undetected during the limitations period. See *False Claims Act Amendments: Hearings before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 159 (1986) (testimony of Richard K. Willard, Assistant Attorney General, proposing a "limited tolling period where the fraudulent conduct has been concealed, as it frequently is, from the government"); *False Claims Reform Act: Hearing on S. 1562 before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 39 (1985) (prepared statement of Jay B. Stephens, Deputy Associate Attorney General) (similar). To address that concern, Congress added a provision that permitted suit to be filed within three years after the government discovers the fraud, subject to a ten-year outer limit. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 5, 100 Stat. 3158.

In its current form, the Act provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. 3731(b).

2. On November 27, 2013, respondent filed his complaint in the present civil action. J.A. 6a, 47a. The complaint alleges that petitioners—two defense contractors—defrauded the United States by submitting false claims for payment under a subcontract to provide security services in Iraq "from some time prior to January 2006 until early 2007." J.A. 43a; see J.A. 19a. In particular, the complaint alleges that the President of Cochise Consultancy had a close personal relationship with a contracting officer in the Army Corps of Engineers, Wayne Shaw, who steered a subcontract to Cochise in exchange for improper gifts and gratuities, and without disclosing the conflict of interest. J.A. 20a-21a.

The government had awarded the Parsons Corporation a $60 million contract to clean up "excess munitions left by retreating or defeated enemy forces." J.A. 33a. Parsons, in turn, solicited bids for a subcontractor to provide security services for the project. J.A. 35a. After a competitive bidding process, a team of Parsons

personnel decided to award the subcontract to a third party. J.A. 36a-37a. Shaw intervened, however, and directed Parsons to award the subcontract to Cochise. J.A. 37a-40a. Respondent worked for Parsons and alleges that he personally observed Shaw's interference. J.A. 24a-25a, 37a-39a.

The complaint further alleges that, as a result of the fraud, the government paid Cochise "in excess of $1 million more per month between February 2006 and September 2006 than it" would have paid if Shaw had not overridden the competitive award. J.A. 40a. The government was also forced to pay an additional $2.9 million for Cochise to acquire armored vehicles necessary to perform the contract. *Ibid.* When Shaw left Iraq, Parsons awarded the subcontract to the third party it had previously selected. *Ibid.*

On November 30, 2010, respondent was interviewed by federal agents about his role in an unrelated contracting fraud in Iraq, for which he ultimately served ten months in prison. Pet. App. 5a. Respondent claims to have told federal agents during the interview about the "fraudulent scheme involving the [Cochise] subcontract for security services." *Ibid.*

In January 2015, the United States declined to intervene in the action, and respondent's complaint was unsealed. J.A. 7a; Pet. App. 6a.

3. In October 2015, petitioners moved to dismiss the complaint as untimely. J.A. 11a; Pet. App. 34a. The parties agreed that the basic six-year limitations period in 31 U.S.C. 3731(b)(1) had elapsed before respondent filed suit on November 27, 2013, given the allegation in the complaint that the fraud had ended in "early 2007." Pet. App. 33a-34a; see J.A. 34a, 43a. Respondent contended, however, that his action was timely under

Section 3731(b)(2) because he had filed his complaint within three years after his November 30, 2010, interview with federal agents (and within ten years after the violation). Pet. App. 34a, 37a.

The district court dismissed the complaint. Pet. App. 32a-40a. The court noted that other courts had adopted "three different interpretations" of Section 3731(b). *Id.* at 35a. Under the first interpretation, Section 3731(b)(2) "simply does not apply" in a qui tam action in which the United States elects not to intervene, *ibid.*, so that any such suit must be filed within six years after the violation. Under the second interpretation, Section 3731(b)(2) applies in non-intervened actions, "but the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action." *Ibid.* Under the third interpretation, Section 3731(b)(2) applies in non-intervened actions, "and the tolling clock does not begin to run until the government knew or should [have known] about the right of action." *Ibid.* The district court rejected the third interpretation and declined to choose between the first two approaches because it found that respondent's complaint would be untimely under either of them. *Id.* at 37a-39a.

4. The court of appeals reversed and remanded. Pet. App. 1a-31a. The court held that Section 3731(b)(2)'s three-year tolling rule applies to qui tam actions in which the United States declines to intervene, *id.* at 14a, and that the proper application of Section 3731(b)(2) in those circumstances turns on the government's knowledge of the fraud, not the relator's, *id.* at 30a.

The court of appeals began "with the words of the statutory provision." Pet. App. 13a (citation omitted). The court noted that both paragraphs (1) and (2) in

Section 3731(b) apply to a "civil action under section 3730." *Id.* at 14a (quoting 31 U.S.C. 3731(b)). The court explained that the plain meaning of that phrase encompasses an FCA suit like this one, because "[a] non-intervened case[] is a type of civil action under § 3730," and "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene." *Ibid.* The court of appeals recognized that in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), this Court had construed the phrase "[a] civil action under section 3730," 31 U.S.C. 3731(b), not to encompass certain claims for retaliation under 31 U.S.C. 3730(h). See Pet. App. 15a-17a. But the court explained that *Graham County* did not directly address the application of Section 3731(b)(2) to non-intervened qui tam actions, *id.* at 17a, and that *Graham County*'s construction of the phrase "civil action under section 3730" to mean "any civil action that has [as] an element a violation of § 3729" would include non-intervened qui tam suits, *id.* at 17a n.8.

The court of appeals rejected petitioners' argument that applying Section 3731(b)(2) in non-intervened qui tam suits would be "absurd." Pet. App. 18a. In the "unique context" of a qui tam action under Section 3730(b)—where a relator sues on behalf of the United States, the government "is entitled to the bulk of the recovery," and the government retains substantial control over the litigation—the court could not "say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene." *Id.* at 19a-20a. The court also rejected petitioners' argument that applying Section 3731(b)(2) in non-intervened

qui tam actions would render Section 3731(b)(1) superfluous, noting that relators would still have ample incentive to bring suit within the six-year limitations period. See *id.* at 23a-24a. Finally, the court reviewed the legislative history and found it silent on the key point and generally supportive of reading Section 3731(b)(2) to "encourage more private enforcement suits." *Id.* at 25a (quoting 1986 Senate Report 23-24); see *id.* at 25a-29a.

The court of appeals also observed that "Section 3731(b)(2) is clear that the time period begins to run when 'the official of the United States charged with responsibility to act in the circumstances' knew or reasonably should have known the material facts about the fraud." Pet. App. 30a (quoting 31 U.S.C. 3731(b)(2)). The court held that, because "the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run," it is the government's knowledge rather than the relator's that triggers Section 3731(b)(2)'s three-year tolling provision. *Ibid.*

Finally, the court of appeals held that dismissal of the complaint was unwarranted. Pet. App. 30a-31a. The court held that, although "facts developed in discovery [may] show that the relevant government official knew or should have known the material facts about the fraud at an earlier date," the allegations of the complaint did not show that the suit was untimely. *Id.* at 31a & n.12.

SUMMARY OF ARGUMENT

1. a. The three-year tolling rule in 31 U.S.C. 3731(b)(2) applies to a relator's qui tam action under Section 3730(b) even if the United States declines to intervene in the suit. Petitioner's own timeliness argument depends on the premise that, for purposes of the basic six-year statute of limitations in Section 3731(b)(1),

respondent's qui tam suit is "[a] civil action under section 3730" within the meaning of the introductory clause of Section 3731(b), even though the United States declined to intervene. 31 U.S.C. 3731(b). If that proposition is accepted, the text of Section 3731(b) makes clear that a non-intervened qui tam action is subject to paragraph (2)'s three-year tolling rule as well.

Although petitioners rely in part on *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), that decision actually supports the ruling of the court below. In *Graham County*, this Court considered whether a relator's suit under 31 U.S.C. 3730(h) alleging unlawful retaliation was subject to the six-year limitations period in Section 3731(b). The Court held that Section 3731(b) did not apply to a Section 3730(h) suit, but its reasons for reaching that conclusion are inapposite here. The Court in *Graham County* construed the phrase "civil action under section 3730" in Section 3731(b)—the same phrase at issue here—to mean "those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions." 545 U.S. at 421-422. A non-intervened qui tam suit arises under Section 3730(b) and has as an element a violation of Section 3729.

Petitioners contend (Br. 20 n.3) that a non-intervened qui tam suit is subject to the basic six-year limitations period in Section 3731(b)(1), but not to the three-year tolling rule in Section 3731(b)(2). Within Section 3731(b), however, the term "civil action under section 3730" appears only once, in the provision's introductory clause. 31 U.S.C. 3731(b). Paragraphs (1) and (2) establish distinct (though complementary) timing requirements for such civil actions. A non-intervened suit cannot be a

"civil action under section 3730" for purposes of paragraph (1) but not (2).

b. The FCA's structure, purpose, and history confirm that Section 3731(b)(2) applies in qui tam actions brought under Section 3730(b) even when the United States declines to intervene. Under the FCA, a relator generally can file suit in the same circumstances and under the same terms as the United States, subject to specific and clearly delineated exceptions. Where the Act subjects relator suits to requirements or limitations that do not apply to government actions, it does so expressly. Section 3731(b) does not draw any such distinction, but instead imposes the same timing requirements on all "civil action[s] under section 3730." 31 U.S.C. 3731(b). That reading also accords with the purpose of the tolling provision. Congress recognized that fraud is often difficult to detect, and it enacted the tolling provision to prevent wrongdoers from benefiting when the government does not discover their frauds before the basic six-year limitations period expires. Nothing in the legislative record suggests that Congress intended to shield wrongdoers from the tolling rule when the United States relies on a relator to prosecute an action.

c. Petitioners' policy concerns are unfounded. Even if the tolling rule in Section 3731(b)(2) applies to non-intervened qui tam suits, private relators will have substantial incentives to report fraud to the government and to file suit expeditiously. Relators who strategically delay filing suit risk being barred from doing so by an earlier private plaintiff, a government action, or a public disclosure of the fraud. Petitioners' concern that the application of Section 3731(b)(2) in non-intervened suits would require burdensome discovery is overstated and does not justify disregarding the plain text of the statute.

2. Under Section 3731(b)(2), the "official of the United States charged with responsibility to act in the circumstances"—the person whose knowledge is relevant for tolling purposes—is always a government official, whether or not the United States elects to intervene. 31 U.S.C. 3731(b)(2). A private relator is not an "official of the United States" in any sense of that term. The relator does not hold an office, receive an appointment or commission, or otherwise exercise any delegated sovereign authority. Nor is a private relator a person "charged with responsibility to act in the circumstances" where evidence of FCA violations comes to light.

Petitioners' contrary view cannot be reconciled with the statutory text, and it would produce bizarre results. Under that approach, a relator's qui tam suit could be timely even though a government suit filed on the same day and alleging the same fraudulent acts would not be. To allow a qui tam suit in that scenario is contrary to the basic logic of the FCA's qui tam mechanism, under which a relator acts as a partial assignee of the government to assert the same claims that the government might have advanced.

ARGUMENT

I. SECTION 3731(b)(2) APPLIES TO A RELATOR'S ACTION UNDER SECTION 3730(b) EVEN IF THE UNITED STATES DECLINES TO INTERVENE IN THE ACTION

The timing rules in 31 U.S.C. 3731(b), including the three-year tolling rule in Section 3731(b)(2), apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). In *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), this Court construed that phrase to mean "those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions," *id.* at 421-

422. Relator suits like this one arise under Section 3730(b), which is entitled "Actions By Private Persons" and authorizes private plaintiffs to bring suit "for a violation of section 3729." 31 U.S.C. 3730(b). A qui tam suit therefore falls squarely within the plain language of Section 3731(b), and within this Court's construction of that language in *Graham County*, whether or not the United States intervenes in the action.

In petitioners' view (Br. 20 n.3), a qui tam suit in which the United States does not intervene is a "civil action under section 3730" for purposes of Section 3731(b)(1)'s basic six-year limitations period, but not for purposes of Section 3731(b)(2)'s tolling rule. But the term "civil action under section 3730" appears only once, in Section 3731(b)'s introductory clause. That term cannot plausibly be thought to have two different meanings depending on which aspect of Section 3731(b)'s timing rules is at issue. Petitioners' reading is also inconsistent with the structure, purpose, and history of the statute. Under the correct interpretation of Section 3731(b), a relator's suit is timely if, but only if, the government could have brought the same suit at the same time.

A. The Text Of Section 3731(b) Does Not Distinguish Among FCA Suits Commenced By The United States, Qui Tam Suits In Which The United States Intervenes, And Qui Tam Suits In Which The United States Declines To Intervene

"Statutory interpretation * * * begins with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), and the text of Section 3731(b) fully resolves this case. A qui tam suit brought under Section 3730(b) is a "civil action under section 3730," 31 U.S.C. 3731(b), and is therefore subject to both the basic six-year statute of limitations

in Section 3731(b)(1) and the three-year tolling rule in Section 3731(b)(2).

1. A civil action brought by a relator for a violation of Section 3729 is "[a] civil action under section 3730"

Section 3731(b) specifies that "[a] civil action under section 3730 may not be brought" if the action falls outside of the periods described in paragraphs (1) or (2), "whichever occurs last." 31 U.S.C. 3731(b). Paragraph (1) is a conventional six-year statute of limitations, while paragraph (2) is the tolling provision at issue here:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

Ibid. The statute is thus drafted so that both paragraphs (1) and (2) apply to "[a] civil action under section 3730." *Ibid.*

As the court of appeals recognized, an action by a relator in which the United States declines to intervene is a "civil action under section 3730." Pet. App. 14a. In particular, Section 3730(b) authorizes a relator to "bring a civil action for a violation of section 3729 for the [relator] and for the United States * * * in the name of the Government." 31 U.S.C. 3730(b). The government

may intervene in any such action, but it is not required to do so. 31 U.S.C. 3730(b)(4). When the government declines to intervene, the relator "bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B); see 31 U.S.C. 3730(c)(3) (similar). But whether or not the government intervenes, the civil action remains at all times an action under Section 3730, and it is therefore subject to both paragraphs (1) and (2) in Section 3731(b).

Petitioners argue (Br. 18) that "Section 3731(b)(2) does not expressly mention relators." But Section 3731(b)(1) likewise does not expressly mention relators. Instead, the operative language that makes both paragraphs (1) and (2) applicable to qui tam suits is the introductory clause, which specifies that the timing rules apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). Petitioners also argue that paragraph (2)'s reference to "the official of the United States charged with responsibility to act in the circumstances" indicates that Congress did not intend for paragraph (2) to apply when the government elects not to intervene. Pet. Br. 18 (citation omitted). But that clause merely specifies whose knowledge counts in applying the discovery rule in paragraph (2); it does not modify or limit the actions to which paragraph (2) applies. "Indeed, there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all." *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996).

2. This Court's decision in* Graham County *confirms that Section 3731(b)(2) applies to this case

The question presented in *Graham County* was whether the six-year limitations period in Section 3731(b)(1) "governs * * * actions for retaliation" under

Section 3730(h). 545 U.S. at 411. When *Graham County* was decided, Section 3730(h) created a cause of action for any "employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" for taking lawful steps to further or assist "an action filed or to be filed" under Section 3730. 31 U.S.C. 3730(h) (2000). Section 3730(h) did not specify a time limit for bringing such an action. See *ibid.*[1]

This Court held that an action under Section 3730(h) alleging unlawful retaliation was not a "civil action under section 3730" for purposes of Section 3731(b), and that the time for filing such a suit therefore was governed not by the FCA's six-year limitations period, but by federal common law, which borrows an analogous state-law period. *Graham County*, 545 U.S. at 422. The Court concluded that, although an action under Section 3730(h) is literally a "civil action under section 3730," the statutory "context" indicated that Section 3731(b) applies "only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions." *Id.* at 415. The Court therefore held that the phrase "'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions." *Id.* at 421-422.

The Court identified two primary bases for that conclusion. First, while the six-year limitations period begins to run when "the violation of section 3729 is committed," 31 U.S.C. 3731(b)(1), Section 3730(h) protects

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[1] Congress later amended Section 3730(h) to add a three-year statute of limitations. See 31 U.S.C. 3730(h)(3); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. X, § 1079A(c)(2), 124 Stat. 2079.

employees from retaliation for assisting in an investigation even when no violation of Section 3729 has occurred. See *Graham County*, 545 U.S. at 416. Second, an employee's cause of action under Section 3730(h) accrues only when the retaliation occurs, which may be more than six years after any violation of Section 3729. See *id.* at 418. Applying Section 3731(b)(1) to Section 3730(h) suits therefore would violate "the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues," *ibid.*, and could cause some retaliation claims to become time-barred before they even accrue, *id.* at 421.

Contrary to petitioners' contention (Br. 17), *Graham County*'s "interpretive approach" does not support their reading of Section 3731(b)(2). Although the Court interpreted the phrase "[a] civil action under section 3730" in Section 3731(b) to "refer only to a subset of § 3730 actions," *Graham County*, 545 U.S. at 418, respondent's suit is squarely within the subset the Court identified, *i.e.*, "civil actions under § 3730 that have as an element a 'violation of section 3729,'" *id.* at 421-422. Civil actions brought by relators under Section 3730(b) have as an element a violation of Section 3729, whether or not the government intervenes. See 31 U.S.C. 3730(b) (authorizing a private person to "bring a civil action for a violation of section 3729"). And, for that reason, treating a non-intervened qui tam suit as a "civil action under section 3730" does not create the practical anomalies that the Court in *Graham County* identified.

Finally, the Court in *Graham County* held that a retaliation claim under Section 3730(h) is not (for limitations purposes) a "civil action under section 3730" *at all*, and therefore is not subject *either* to Section 3731(b)(1)'s basic six-year limitations period *or* to Section 3731(b)(2)'s

tolling rule. Petitioners, by contrast, would treat respondent's qui tam suit as a "civil action under section 3730" for purposes of the six-year deadline, but not for tolling purposes. Nothing in *Graham County* supports that approach.

3. Petitioners' textual arguments lack merit

a. In petitioners' view (Br. 39), a qui tam action in which the United States declines to intervene is subject to the six-year limitations period in Section 3731(b)(1), but not to the three-year tolling rule in Section 3731(b)(2). Yet both those provisions apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). A non-intervened suit cannot simultaneously be a "civil action under section 3730" for purposes of Section 3731(b)(1) but not (b)(2), since the "*same* * * * provision" of a statute cannot "bear[] two different meanings" at the same time. *Clark* v. *Martinez*, 543 U.S. 371, 380, 383 (2005); see *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.") (citing *Bankamerica Corp.* v. *United States*, 462 U.S. 122, 129 (1983)); *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation * * * the same way each time it is called into play.") (citation omitted).

Petitioners' reliance (Br. 19-20) on 31 U.S.C. 3731(d) is thus misplaced. Section 3731(d) states: "In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. 3731(d). The United States has

nothing to prove in a relator's action under Section 3730(b) in which the government has declined to intervene. In *Graham County*, this Court accordingly recognized that the "context of this provision" (which at the time was codified as Subsection (c), see Pet. Br. 19 n.2) implies that the phrase "any action brought under section 3730" as used in Section 3731(d) "refer[s] only to a subset of § 3730 actions"—specifically, to those actions that are "brought by the United States" or in which "the United States intervenes as a party." 545 U.S. at 418.

That is not, however, the interpretation petitioners urge here. If the phrase "[a] civil action under section 3730" in Section 3731(b)'s introductory clause referred only to the subset of Section 3730 actions that are brought by the United States or in which the United States intervenes, see *Graham County*, 545 U.S. at 418, then a non-intervened suit would be subject to neither the tolling rule in Section 3731(b)(2) nor the basic six-year limitations period in Section 3731(b)(1)—a result petitioners expressly repudiate (Br. 20 n.3). Petitioners suggest (*ibid.*) that the phrase "[a] civil action under section 3730" is "used in Section 3731(b)(1)." But it is not. That phrase appears only in Section 3731(b)'s introductory clause and describes the set of actions to which both paragraphs (1) and (2) apply. Petitioners' position thus would require giving the same phrase two different meanings in a non-intervened action—a textual aberration that *Graham County* did not countenance and that Section 3731(d) does not support.

b. Petitioners argue (Br. 20-21) that Congress modeled Section 3731(b)(2) on 28 U.S.C. 2416(c); that Section 2416(c) "applies only to suits brought by the government"; and that Section 3731(b)(2) should therefore be read the

same way. Section 2416(c) states that the applicable statute of limitations should be tolled when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. 2416(c). But Congress did not import into Section 3731(b)(2) the specific language that limits Section 2416(c) to suits by the government.

Section 2416(c) applies only "[f]or the purpose of computing the limitations periods established in section 2415," 28 U.S.C. 2416, and Section 2415 in turn establishes the "[t]ime for commencing actions brought by the United States," 28 U.S.C. 2415. As the court below explained, the "language in § 2416" that Congress incorporated into the FCA "is not what specifies that a limitations period in § 2415 applies only when the United States is a party," because "§ 2415 itself dictates that the United States must be a party for its limitations period to apply." Pet. App. 27a-28a. Section 3731(b)(2), by contrast, establishes a tolling rule not for suits "brought by the United States," or suits "to which the United States is a party," but for "[a] civil action under section 3730"—a term that encompasses respondent's non-intervened qui tam suit.

c. Petitioners argue (Br. 18-19, 22-26) that "default" common-law rules would preclude a relator from benefiting from tolling the statute of limitations when the United States is not a party to the action, and that Congress must speak clearly to displace those default rules. But petitioners do not identify any common-law rule regarding tolling in qui tam actions, and none of the statutes or decisions they cite (Br. 23-25 & nn.4-5) addresses those circumstances. In any event, Congress

did speak clearly in establishing a tolling rule that encompasses non-intervened qui tam suits. The three-year tolling rule applies to any "civil action under section 3730," 31 U.S.C. 3731(b), and a non-intervened qui tam suit is such a civil action.

d. Petitioners argue (Br. 27-28) that reading Section 3731(b)(2) to apply in non-intervened qui tam suits would render Section 3731(b)(1) largely superfluous in such cases, "effectively nullifying one of the two limitations provisions." Petitioners' argument rests on the premise (Br. 28) that cases in which "the government learn[s] about the fraud within the first three years of its occurrence * * * are likely to be rare." Petitioners identify no sound basis for that assertion. And if the government rarely learned of fraud within the first three years after its occurrence, Section 3731(b)(1)'s basic six-year statute of limitations would seldom control the timeliness inquiry in *government-initiated* suits either. In any event, petitioners' speculation provides no basis for disregarding the clear statutory language.

B. The Structure, Purpose, And History Of The Statute Confirm That Section 3731(b)(2) Applies Even When The United States Declines To Intervene

The general thrust of the FCA's qui tam provisions is to allow private relators to sue in any circumstance where the United States could bring its own enforcement action alleging a violation of Section 3729. When Congress wishes to depart from that general approach, by subjecting relator suits to restrictions that do not apply to government actions, it has expressed that intent explicitly. The tolling provision in Section 3731(b)(2) contains no such distinction. Moreover, Section 3731(b)(2) was enacted to ensure that FCA violators do not benefit

when their fraud does not come to light during the limitations period, and petitioners' reading would frustrate that purpose. The legislative history confirms the purpose of the tolling provision, and it does not suggest that Members of Congress intended to shield wrongdoers from the tolling rule when the United States relies on a relator to prosecute an action under Section 3730(b).

1. Where the FCA distinguishes between relators and the government, it does so clearly

a. The structure of the FCA reinforces the conclusion that Section 3731(b)(2)'s tolling rule applies to non-intervened qui tam suits. The Act permits a relator to bring an action "in the name of the Government," 31 U.S.C. 3730(b)(1), for an injury "suffered by the United States," *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). If the government declines to intervene, the relator "conduct[s] the action," 31 U.S.C. 3730(b)(4)(B) and (c)(3), and enforces the same substantive antifraud prohibitions that the United States enforces when it brings suit or intervenes, see 31 U.S.C. 3729. The general thrust of the Act's qui tam provisions thus is to allow a relator to commence and pursue an FCA suit in the same circumstances where the government can pursue its own enforcement action.

When Congress wishes to subject private relators to restrictions that do not apply to the government, it has enacted explicit statutory language to accomplish that objective. A relator must file his complaint under seal and cannot proceed with the action until the government has had an opportunity to consider intervening. 31 U.S.C. 3730(b)(2) and (4). If the government intervenes, the FCA carefully delineates the government's rights to control the action. 31 U.S.C. 3730(c)(1) and

(2)(A)-(B). The Act also specifies in detail the respective rights of the relator and the government in cases where the government does *not* intervene. *E.g.*, 31 U.S.C. 3730(c)(3); see pp. 2-3, *supra*. Other FCA provisions explicitly preclude qui tam suits, but not government enforcement actions, under specified circumstances. See, *e.g.*, 31 U.S.C. 3730(e)(2)(A) and (4)(A).

Section 3731(b)(2), by contrast, does not distinguish between relators and the government. To the contrary, Section 3731(b)(2)'s tolling rule, like the basic six-year statute of limitations contained in Section 3731(b)(1), applies to any "civil action under section 3730." 31 U.S.C. 3731(b). In light of the express distinctions drawn elsewhere in the FCA, to construe Section 3731(b)(2) as implicitly distinguishing between intervened and non-intervened suits would violate the presumption that "Congress acts intentionally and purposefully" when it includes "particular language in one section of a statute but omits it in another." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citations omitted).

b. Reading Section 3731(b)(2) to apply to qui tam actions in which the United States does not intervene also accords with the FCA's structure by ensuring that, for timing purposes, the relator is in the same shoes as the government. If an action by the government would be time-barred, so too would a similar action by a private relator. If an action by the government would be timely, so too would a similar action by a private relator.

Petitioners assert (Br. 26-27) that reading Section 3731(b)(2) to apply in non-intervened suits would give relators "a longer period to sue than the government in some scenarios where a relator and the government are similarly situated." Petitioners' point is that, in cases like this one, where a relator learns of an alleged fraud

before the government does, the court of appeals' interpretation of Section 3731(b)(2) allows the relator to sue more than three years after the relator himself learned of the fraud. By that standard, however, Section 3731(b)(1)'s basic six-year limit would also give relators who learn of an alleged fraud before the government does "a longer period to sue than the government." Pet. Br. 26. In devising a statute of limitations for FCA suits, Congress instead adopted a different form of parallel treatment, under which a qui tam suit is timely if, but only if, a government suit filed on the same day and alleging the same violation would be timely.

2. Petitioners' reading would frustrate the purpose of the tolling provision

Congress added Section 3731(b)(2) to the FCA in 1986, in the course of making significant amendments to the Act. See False Claims Amendments Act of 1986, § 5, 100 Stat. 3158; Resp. Br. 8-9, 45-47; p. 3, *supra*. The tolling provision was drafted to ensure that wrongdoers do not escape liability simply because their frauds go undetected by the government during the six-year limitations period. See 1986 Senate Report 15 (fraud "is, by nature, deceptive" and may be obscured by the "wrongdoer's successful deception"); cf. H.R. Rep. No. 660, 99th Cong., 2d Sess. 25 (1986) (1986 House Report) ("fraud is often difficult to detect"); 132 Cong. Rec. 20,536 (1986) (the "tolling provision [should] be liberally construed because the conduct addressed here is so inherently deceptive and carefully concealed" (statement of Sen. Grassley)). Like other discovery rules, Section 3731(b)(2) thus serves to prevent the limitations period from becoming "the means by which [the defendant's fraud] is made successful and secure." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010) (quoting *Bailey* v.

Glover, 88 U.S. (21 Wall.) 342, 349 (1875)); see *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1307 (C.C.D.N.H. 1828) (No. 12,782) (Story, J.).

Petitioners' reading would contravene the purpose of the tolling provision by making it inapplicable to many civil FCA suits. For a variety of reasons, the United States intervenes in only about one-quarter of qui tam actions, which in turn significantly outnumber the actions brought by the government. See Pet. App. 9a n.4, 12a n.6; Civil Division, U.S. Dep't of Justice, *Fraud Statistics – Overview* 1-2 (2018), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery. Petitioners' reading would thus allow many wrongdoers to escape liability by concealing their frauds for six years and then asserting the statute of limitations to bar a qui tam suit, even when the suit is filed within three years after the government learns of the fraud.

3. The legislative history of the statute supports giving effect to its plain meaning

This Court need not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf*, 510 U.S. at 147-148. But, to the extent that the legislative history of the 1986 FCA amendments sheds any light on the question presented here, it confirms that Section 3731(b)(2)'s tolling rule was intended to prevent wrongdoers from benefiting when their frauds are concealed. See pp. 3, 23, *supra*. The amendments also had an overall goal of "encourag[ing] more private enforcement suits." 1986 Senate Report 23-24. Applying Section 3731(b)(2) in non-intervened qui tam suits furthers both of those purposes.

Petitioners argue (Br. 37-39) that the legislative history reflects an exclusive concern with suits by the government itself. See, *e.g.*, 1986 House Report 25 ("[T]he

statute of limitations should not preclude *the Government* from bringing a cause of action under this Act if they were not aware of the fraud.") (emphasis added). But "the legislative history of the Act is replete with many instances in which the word 'government' is used when referring to suits brought in the name of the United States by either the Attorney General or private qui tam plaintiffs." *Hyatt*, 91 F.3d at 1214. "For example, in discussing the scienter requirement, the committee reports refer to evidence which the 'government' must offer." *Id.* at 1214-1215 (quoting 1986 Senate Report 6-7). "Given this history," the absence of specific references to relators in the legislative discussions of tolling "is a weak rationale to support a decision contrary to the plain meaning of the statute." *Id.* at 1215.

C. Petitioners' Policy Concerns Are Unfounded

1. Petitioners speculate (Br. 28-31) that applying Section 3731(b)(2) to non-intervened suits will create an incentive for relators with knowledge of actionable fraud to delay bringing suit while potential damages accumulate, in order to maximize their recoveries. That concern is unrealistic, however, given the many FCA provisions that "create strong incentives to ensure that relators promptly report fraud." Pet. App. 23a. If a prospective relator delays filing suit, a second relator or the government may sue first and preempt the relator's claim, see 31 U.S.C. 3730(b)(5) (first-to-file bar) and (e)(3) (government-action bar); or the alleged fraud may be "publicly disclosed" by another source in the interim, likewise barring suit. 31 U.S.C. 3730(e)(4). Under the correct interpretation of the Act, moreover, the three-year tolling provision runs from the date "when facts material to the right of action are known or reasonably should have been known by" the government. 31 U.S.C.

3731(b)(2). A prospective relator who does not report a fraud to the government and instead delays filing suit runs the risk that the tolling period will expire sooner than expected because the government has learned of the fraud from another source.

A prospective relator also must carry his burden of proof in order to obtain any recovery at all. A relator who "wait[s] to sue 'until evidence has been lost, memories have faded, and witnesses have disappeared,'" Pet. Br. 30 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974)), will have a more difficult time establishing liability and recovering damages even if the defendant remains solvent. And even where a relator successfully prosecutes a qui tam action, a district court may take into account any dilatory conduct in determining the relator's share of the recovery. See 31 U.S.C. 3730(d)(1) and (2) (allowing adjustments to the relator's share in intervened and non-intervened cases).

2. Petitioners assert (Br. 32-33) that applying the tolling provision in non-intervened suits will entail intrusive discovery into the government's knowledge of the fraud—*i.e.*, into when, if ever, the responsible government official knew or should have known the "facts material to the right of action." 31 U.S.C. 3731(b)(2). That concern does not justify disregarding the plain text of the statute. The government's knowledge or lack thereof could be established by affidavit, and the ability of private parties to obtain civil discovery from the government as a non-party is limited. See *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 468-469 (1951); cf. 28 C.F.R. 16.21-16.29 (Department of Justice *Touhy* regulations).[2]

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[2] The court of appeals also explained that private parties in non-intervened suits may seek to put the government's knowledge at issue for other reasons. See Pet. App. 22a n.10; cf. *Universal Health*

II. UNDER SECTION 3731(b)(2), A PRIVATE RELATOR IS NEVER "THE OFFICIAL OF THE UNITED STATES" WHOSE KNOWLEDGE OF FRAUD TRIGGERS THE COMMENCEMENT OF THE THREE-YEAR TOLLING PERIOD

Section 3731(b)(2)'s tolling period begins to run when "the official of the United States charged with responsibility to act in the circumstances" knew or reasonably should have known about the fraud. 31 U.S.C. 3731(b)(2). Whether or not the government intervenes in a particular qui tam suit, that tolling period is triggered by the knowledge of the relevant government official, not by the knowledge of the private relator.

A. For purposes of "act[ing] in the circumstances," 31 U.S.C. 3731(b)(2)—*i.e.*, determining the appropriate governmental response to evidence of FCA violations—the relevant government official is an officer of the Department of Justice.[3] The FCA states that the Attorney General "diligently shall investigate a violation of section 3729" and "may bring a civil action" under Section

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Servs., Inc. v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) ("[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

[3] Congress considered a version of the tolling provision that would have made this explicit. See S. 1562, § 3(1), 99th Cong., 2d Sess. (as reported from the S. Comm. on the Judiciary, July 28, 1986) ("when facts material to the right of action are known * * * by the official *within the Department of Justice* charged with responsibility to act") (emphasis added); cf. 1986 Senate Report 15 (noting that the proposed tolling provision would depend on "when the Government learned of a violation"). In settling on the present language, see 1986 House Report 4-5; 132 Cong. Rec. 28,576, there is no indication that Congress wished to expand the relevant universe of officials beyond the Department of Justice—let alone to private relators.

3730(a). 31 U.S.C. 3730(a). The Attorney General has delegated his authority to the Assistant Attorney General for the Civil Division, 28 C.F.R. 0.45(d); see 28 U.S.C. 510, who in turn has re-delegated that authority in some circumstances to other subordinate officials within the Department. See 28 C.F.R. Pt. 0, Subpt. Y, App. 85-86 (Civil Div. Directive No. 1-15). The Assistant Attorney General or his delegate therefore is "the official of the United States charged with responsibility to act" for purposes of Section 3731(b)(2).

B. A private relator, by contrast, is not an "official of the United States." A private relator is not appointed in the manner of officers of the United States, see U.S. Const. Art. II, § 2, Cl. 2, or even employed by the United States. Because a relator does not hold an office, receive an appointment or commission, or otherwise exercise any delegated sovereign authority, he does not satisfy the definitions of "official" that petitioners cite (Br. 41 n.8). The government also does not "deputize[ ]"any particular relator to bring any particular action. Pet. Br. 41 (citation omitted). Consistent with those facts, the FCA provision that authorizes qui tam suits is entitled "Actions By Private Persons." 31 U.S.C. 3730(b).

A private relator also is not the person "charged with responsibility to act in the circumstances" where evidence of FCA violations comes to light. 31 U.S.C. 3731(b)(2). Under Section 3730(b)(1), a private person who learns of FCA violations and satisfies the statutory prerequisites is entitled to file suit "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). Nothing in the FCA or in any other federal law, however, purports to *require* such a person to commence a qui tam suit. Rather, the person "charged with

responsibility to act in the circumstances" is the Department of Justice officer whose official *duties* include the investigation and remediation of a particular fraud.[4]

C. That reading is confirmed by Section 3729(a)(2)(A), which uses similar language in a manner that could not sensibly be read to describe relators. Under that provision, a defendant's damages liability for a particular false claim may be reduced if the defendant self-reported the violation within 30 days to "officials of the United States responsible for investigating false claims." 31 U.S.C. 3729(a)(2)(A). The violator must also "cooperate[] with any Government investigation" after self-reporting. 31 U.S.C. 3729(a)(2)(B). That provision reflects the evident understanding that the "officials of the United States" who are "responsible for investigating false claims," and to whom a violator must self-report in order to qualify for reduced damages, are government officials.

Petitioners' reading would also produce "textual anomal[ies]" and "counterintuitive results." *Graham County*, 545 U.S. at 416, 421. In this case, petitioners argue that respondent's suit was time-barred even though a government suit filed on the same day would have been timely under Section 3731(b)(2). In cases where the government learns of a fraud *first*, however, petitioners' approach would allow a qui tam suit to go forward even though a government suit filed on the same

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[4] Section 3731(b)(2)'s use of the definite article—"*the* official of the United States," 31 U.S.C. 3731(b)(2) (emphasis added)—"indicates that there is generally only one proper" official. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004). It is particularly farfetched to suppose that respondent was the *only* person "charged with responsibility to act in the circumstances" when he first learned of petitioners' alleged fraud, nearly three years before the present qui tam suit was filed.

day would be time-barred. See Pet. Br. 44-45. Since a relator sues as, in effect, "a partial assign[ee] of the Government's damages claim," *Stevens*, 529 U.S. at 773, it would be anomalous to allow a relator to sue on a claim that the government as assignor was time-barred from asserting. Petitioners' reading further implies that, if a relator brings suit in those circumstances and the government intervenes, the suit will be untimely after all, since on petitioners' view Section 3731(b)(2) makes the knowledge of the relator dispositive only in *non-intervened* qui tam actions. Nothing in the FCA indicates that Congress contemplated a subset of qui tam actions in which the United States is effectively barred from intervening.

D. Petitioners contend (Br. 43) that, "[u]nder the Eleventh Circuit's decision, * * * the timeliness of a relator's suit would not depend on the factors relevant under default tolling principles—the plaintiff's knowledge and diligence—but on whether and when the government learned of the fraud." But even in a qui tam suit where the government declines to intervene, "the United States is a 'real party in interest' in a case brought under the FCA." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (quoting Fed. R. Civ. P. 17(a)). The gravamen of an FCA qui tam suit is that the defendant has committed a legal wrong *against the government*, and the relator acts as "a partial assign[ee]" of the United States' claim. *Stevens*, 529 U.S. at 773.[6] Even

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[6] Petitioners are wrong to suggest (Br. 43 n.9) that any well-established background rule governs the application of tolling and discovery rules to assigned claims. Compare *John Beaudette, Inc.* v. *Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 109 (D. Mass. 1999) (looking to the assignor's knowledge), and *Murphy* v. *Jefferson Pilot Commc'ns Co.*, 657 F. Supp. 2d 683, 692 (D.S.C. 2008) (same), with *Bierman* v. *International Bus. Machs. Corp.*, 547 Fed. Appx.

when the government initially declines to intervene, it can (among other prerogatives) object to the relator's proposed settlement and voluntary dismissal of the suit, 31 U.S.C. 3730(b)(1); dismiss the case, 31 U.S.C. 3730(c)(2)(A); intervene later in the proceedings for good cause shown, 31 U.S.C. 3730(c)(3); and receive the bulk of any monetary recovery the suit produces, 31 U.S.C. 3730(d)(1) and (2). Given the government's continuing interest in a non-intervened qui tam suit, there is nothing anomalous about Congress's decision to craft a tolling rule that turns on the government's knowledge rather than on the relator's.

Petitioners' argument suggests at the very most that, if Congress had left it to courts to apply common-law tolling principles to the idiosyncratic cause of action that a relator pursues in a non-intervened qui tam suit, the choice of a proper tolling rule would not be free from doubt. Congress obviated the need for such an inquiry, however, by specifying that the availability of tolling turns on the knowledge of "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. 3731(b)(2). Petitioners' speculation that common-law tolling principles would support a different rule provides no basis for disregarding the clear import of the statutory text.

851, 852 (9th Cir. 2013) (looking to the knowledge of both the assignor and assignee).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the Nation's leading research-based biopharmaceutical companies. PhRMA's members research and develop innovative medicines, treatments, and vaccines that save, prolong, and improve the quality of lives of countless individuals around the world every day.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector,

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[1] The parties have consented to the filing of this brief, and copies of letters granting consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Defense Industrial Association (NDIA) is a non-partisan and non-profit organization comprised of more than 1,650 corporations and 75,000 individuals spanning the entire spectrum of the defense industry. NDIA's corporate members include not only some of the nation's largest military equipment contractors, but also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individuals who are members of NDIA come from the Federal Government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

This case presents a critical question affecting *amici* and their members, who are often sued under the False Claims Act's *qui tam* provisions: whether a relator in a *qui tam* False Claims Act suit may lengthen the limitations period by invoking 31 U.S.C. § 3731(b)(2)—which runs from the date when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even though the United States has declined to intervene. The Eleventh Circuit's decision imposes significant burdens on *amici*'s members by allowing relators to bring very stale suits, based on events up to a decade

old, even when they knew of the alleged violation many years earlier.

SUMMARY OF ARGUMENT

Departing from all other courts of appeals that have decided the issue, the Eleventh Circuit charted a new course in interpreting 31 U.S.C. § 3731(b)(2)—one that is inconsistent with this Court's decision in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), ignores both statutory text and purpose, and imposes significant burdens on False Claims Act defendants. This Court should reverse.

The Eleventh Circuit concluded that a *qui tam* relator may lengthen the limitations period to ten years because, in its view, the phrase "civil action under section 3730" in subsection 3731(b) is all-inclusive, encompassing a relator's suit in which the government has declined to intervene. As this Court has previously held, however, Congress used that phrase "imprecisely." *Graham Cty.*, 545 U.S. at 418. The same kinds of statutory context that led this Court in *Graham County* to read subsection 3731(b)(1) as excluding retaliation actions should lead the Court to conclude that subsection 3731(b)(2) does not apply to *qui tam* actions in which the government has declined to intervene.

Subsection 3731(b) provides:

> A civil action under section 3730 may not be brought—
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or

> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Subsection 3731(b)(2) confines its reach to actions involving "the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2). A government official is "charged with responsibility to act" only in cases in which the government is a party. *Id.* Thus, reading subsection 3731(b)(2) as covering cases in which the government has chosen not to become a party would create just the sort of "textual anomaly" this Court found unacceptable in *Graham County*. 545 U.S. at 416.

Interpreting subsection 3731(b)(2) as applying in cases the government has declined to join would lead to other "counterintuitive results" as well. *Graham Cty.*, 545 U.S. at 421. First, subsection 3731(b)(1) would be rendered largely superfluous. If subsection 3731(b)(2) applied in declined cases, then subsection 3731(b)(1) would define a relator's limitations period only in the rare circumstances when the government learns of the alleged violation within three years of when it happened. Second, the running of a relator's limitations period would be triggered by the government's knowledge of material facts even though the government is not a party to the case. This would give relators a financial incentive to wait before reporting fraud

to the government (or bringing an action) because the longer the fraud persists, the greater the potential recovery would be. It would thus frustrate one of the False Claims Act's core purposes: to combat fraud against the government by encouraging those with insider knowledge to come forward promptly.

The practical consequences of allowing relators to lengthen the limitations period also counsel against allowing relators to rely on subsection 3731(b)(2) when the government has declined to intervene. Every year, *qui tam* relators file hundreds of False Claims Act complaints, the vast majority of which are litigated by relators only, without the government's intervention. *See* DOJ, *Fraud Statistics—Overview: October 1, 1986 – September 30, 2018*, at 1, https://www.justice.gov/civil/page/file/1080696/download (visited Jan. 9, 2019); Pet. App. 9a n.4. This Court's approval of the Eleventh Circuit's decision would not only encourage more *qui tam* suits overall, but would encourage exactly the wrong kind of False Claims Act suits—stale claims up to a decade old which the government has decided are not worthwhile to pursue and which frequently turn out to be meritless.

Companies doing business with the government suffer as a result. Ten years is a very long time when it comes to loss of evidence. Without a robust statute of limitations that screens out stale claims, False Claims Act defendants would have to expend significant costs to defend against allegations for which memories have faded and witnesses are less reliable. Those costs, coupled with the threat of cumbersome discovery and treble damages, may lead defendants to settle non-intervened claims, irrespective of their merits. Government contractors will also incur reputational damage simply from being sued. That damage has lasting

impact, particularly for smaller and relatively new businesses.

For all of these reasons, the Court should hold that subsection 3731(b)(2) is not available in *qui tam* cases in which the government has declined to intervene.

ARGUMENT

I. SUBSECTION 3731(b)(2) APPLIES ONLY TO CASES IN WHICH THE UNITED STATES IS A PARTY

The Eleventh Circuit held that a relator may lengthen the limitations period up to ten years under subsection 3731(b)(2) because subsection 3731(b) applies to "[a] civil action under section 3730" and a non-intervened *qui tam* suit qualifies as such a civil action. Pet. App. 14a. But, as this Court emphasized in addressing subsection 3731(b) before, "[s]tatutory language has meaning only in context." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). And the context supplied by subsection 3731(b)(2) to subsection 3731(b)'s reference to "a civil action under section 3730" makes clear that it "refer[s] only to a subset of § 3730 actions." *Id.* at 417-418. Indeed, the fundamental flaw of the Eleventh Circuit's decision is that it distinguished *Graham County* in the broadest brushstroke possible—that it did not "directly address[]" whether subsection 3731(b)(2) applies to a non-intervened *qui tam* action, Pet. App. 17a—while ignoring the Court's reasoning that compelled a narrower reading of a "civil action under section 3730."

In *Graham County*, the Court held that the six-year statute of limitations in subsection 3731(b)(1) does not apply to retaliation claims, even though the whole of subsection 3731(b) applies to a "civil action under

section 3730" and retaliation claims are authorized by subsection 3730(h). 545 U.S. at 415-422. The Court reached this conclusion for two reasons. First, the statutory context indicated that Congress used the phrase "[a] civil action under section 3730" "imprecisely," and reading that prefatory phrase broadly would create a "textual anomaly" in which the phrase's application to a retaliation claim would "sit[] uneasily with § 3731(b)(1)'s language." *Id.* at 415-416, 418. Specifically, the Court noted, subsection 3731(b)(1) identified a "violation of section 3729" as the triggering event from which § 3731(b)(1)'s limitations period would run, but a plaintiff bringing a retaliation claim would not need to allege any such violation. *Id.* at 416. Second, the Court found that this and other "counterintuitive results" warranted a narrower reading of "civil action under section 3730." *Id.* at 420-421. Both of those reasons for reading "[a] civil action under section 3730" as referring "only to a subset of § 3730 actions" apply with the same force to subsection 3731(b)(2) as to 3731(b)(1).

A. Statutory Context Makes Clear That *Qui Tam* Relators May Not Invoke The Longer Limitations Period In Subsection 3731(b)(2) When The Government Declines To Intervene

Much as in *Graham County*, the particular subsection at issue here—subsection 3731(b)(2)—contains limiting language, providing for a limitations period triggered by the knowledge of "the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2). The Eleventh Circuit understood this phrase to refer to a government official. Pet. App. 29a-31a; *see also United States ex rel. Sanders* v. *North Am. Bus Indus., Inc.*, 546 F.3d 288, 293-294 (4th Cir. 2008); *United States ex rel. Sikkenga* v. *Regence Blue-*

cross Blueshield of Utah, 472 F.3d 702, 726 (10th Cir. 2006). Thus, Congress clearly intended the longer limitations period in subsection 3731(b)(2) to apply to those False Claims Act actions in which the government has chosen to participate—the only kind of suit in which the government is "charged with responsibility to act." 31 U.S.C. § 3731(b)(2); *cf. Charge*, Oxford English Dictionary 13.c ("to take upon oneself the charge or responsibility of"), http://www.oed.com/view/Entry/30688?rskey=kSkNkL&result=3#eid; *Responsibility*, Oxford English Dictionary 2.b ("[t]he state or fact of being in charge of or of having a duty towards a person or thing; obligation"), http://www.oed.com/view/Entry/163862?redirectedFrom=responsibility#eid; *Responsibility*, Black's Law Dictionary 1506 (10th ed. 2014) ("[t]he quality, state, or condition of being answerable or accountable").

Interpreting subsection 3731(b)(2) as applying in non-intervened cases would thus create just the sort of "textual anomaly" that this Court denounced in *Graham County*. 545 U.S. at 416. Setting aside the fact that a government official would not be "charged with" any "responsibility" in a non-intervened case, there would also be nothing to "act" on in such circumstances. 31 U.S.C. § 3731(b)(2). As the Fourth Circuit noted, "it is doubtful that the government official 'charged with responsibility to act in the circumstances' could be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period." *Sanders*, 546 F.3d at 294. By contrast, it would be bizarre to say a government official is "'charged with responsibility' to ensure that *a relator* brings a timely FCA action." *Id.* (emphasis added).

Limiting subsection 3731(b)(2) to intervened actions also makes sense because "'the specific governs

the general'" in statutory construction. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). As this Court noted, that canon has "full application" where, as here, "a general authorization and a more limited, specific authorization exist side-by-side." *Id.* Accordingly, the specific authorization in subsection 3731(b)(2)—that it apply only to suits in which a government official would have "responsibility to act," 31 U.S.C. § 3731(b)(2)—supersedes the general authorization in the prefatory phrase "[a] civil action under section 3730," *id.* § 3731(b). In other words, whatever the scope of a "civil action under section 3730," it should "'not be held to apply to a matter specifically dealt with'" in subsection 3731(b)(2). *RadLAX Gateway Hotel*, 566 U.S. at 646-647 (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)).

The Eleventh Circuit barely addressed this textual evidence, merely stating that "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators" in non-intervened suits. Pet. App. 14a. The court thus offered no basis to dispel the "textual anomaly" its interpretation creates. *Graham Cty.*, 545 U.S. at 416.

The contemporaneous understanding of the 1986 amendments to the False Claims Act confirms that Congress did not intend subsection 3731(b)(2) to apply to *qui tam* cases the government does not join. Subsection 3731(b)(2) was added in 1986 as a limited tolling period for the government. Before 1986, the False Claims Act's limitations provision simply stated that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). Experience demonstrated that "requests to sue" may "come in right on the brink of the statute of limitations, and sometimes

beyond," which might preclude the government from acting on fraud that "ha[d] been concealed, as it frequently is, from the Government." *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 99th Cong. 159 (1986) ("*House Hearings*") (statement of Assistant Attorney General Willard). The additional limitations period in subsection 3731(b)(2) was designed to give the government "a little more flexibility" in bringing those actions, *id.*, based on when the relevant information has reached "an official in a position both to recognize the existence of a possible violation of [the False Claims Act] and to take steps to address it," 132 Cong. Rec. 20,530, 20,536 (1986) (statement of Senator Grassley, lead sponsor of the 1986 amendments).

The model upon which subsection 3731(b)(2) was based further indicates that the longer limitations period applies only in cases in which the government intervenes. Subsection 3731(b)(2) was "adopted directly from" the general tolling provision in 28 U.S.C. § 2416(c). 132 Cong. Rec. at 20,536 (statement of Senator Grassley); *compare* 31 U.S.C. § 3731(b)(2) (action must be brought within three years of when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances") *with* 28 U.S.C. § 2416(c) (general statute of limitations excludes periods during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances").

Subsection 2416(c) permits tolling *only* in actions brought by the government. *See, e.g.*, 28 U.S.C. § 2416

("Time for commencing actions brought by the United States—Exclusions"). It is true, as the Eleventh Circuit noted, that section 2415 says the limitations period in section 2416 applies only to claims "brought by the United States or an officer or agency thereof." *Id.* § 2415(a), (b); *see* Pet. App. 27a-28a. But the Eleventh Circuit overlooked that similarly limiting language exists in subsection 3731(b)(2)—"the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2); *see supra* pp. 7-9. That language confines the reach of subsection 3731(b)(2) much as the similar language in section 2415 confirms the limited reach of section 2416.

B. Allowing Relators To Invoke Subsection 3731(b)(2) Creates Counterintuitive Results

A contrary reading would lead to numerous "counterintuitive results." *Graham Cty.*, 545 U.S. at 421.

First, subsection 3731(b)(1) would be rendered largely superfluous. This Court has noted "time and again" that courts are "'obliged to give effect, if possible, to every word Congress used,'" *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 632 (2018), and not render a clause, sentence, or word "'superfluous, void, or insignificant,'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Yet, the Eleventh Circuit's interpretation does precisely that. Allowing relators to rely on subsection 3731(b)(2) would give relators a financial incentive to delay bringing an action because the longer the fraud persists, the greater the potential recovery would be. The only scenario in which the six-year limitations period in subsection 3731(b)(1) would "expire later" (Pet. App. 24a) than the limitations period in subsection 3731(b)(2) is if the government were to learn of the alleged violation within three years of

when it occurred. If the government were to learn of the alleged violation three years or more after it occurred, subsection 3731(b)(1) would have no effect. *See Sikkenga*, 472 F.3d at 726 ("If relators could avail themselves of the tolling provisions of § 3731(b)(2), then we are hard pressed to describe a circumstance where the six-year statute of limitations in § 3731(b)(1) would be applicable.").

The Eleventh Circuit dismissed these concerns because, in its view, other provisions of the False Claims Act—such as the first-to-file bar, *see* 31 U.S.C. § 3730(b)(5), or the public disclosure bar, *id.* § 3730(e)(4)—may provide an incentive for relators to promptly report a violation to the government. Pet. App. 23a-24a. But when Congress added subsection 3731(b)(2) in 1986, the False Claims Act already barred a relator's action that is "based on evidence or information the Government had when the action was brought." Pub. L. No. 97-258, 96 Stat. 877, 979. Still, Congress deemed the additional tolling period in subsection 3731(b)(2) necessary because fraud was "frequently" concealed from the government until the then-existing six-year statute of limitations period ran out. *House Hearings* 159 (statement of Assistant Attorney General Willard). And here, the incentives that the Eleventh Circuit referenced seemingly had little effect because the relator waited seven years after he learned of the alleged violation to file suit. *See* Pet. App. 3a-5a.

Moreover, whatever incentive the public-disclosure and first-to-file bars may offer, relators have "a strong financial incentive" to wait and "allow false claims to build up" because doing so would "increas[e] their own potential recovery." *Sanders*, 546 F.3d at 295. That incentive means that if relators can take advantage of subsection 3731(b)(2) in declined cases, subsection

3731(b)(1) will inevitably become "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *see also New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 681 (2010) (rejecting reading that "dramatically undercuts the significance" of another statutory provision).

Second, under the Eleventh Circuit's reading, a relator's limitations period would be triggered by the knowledge of a government official, a non-party to the case. Not only does that encourage a wait-and-see approach by relators, but it also makes "no sense whatsoever" because "[t]he government's knowledge of 'facts material to the right of action' does not notify the relator of anything," meaning, "that knowledge cannot reasonably begin the limitations period for a relator's claims." *Sanders*, 546 F.3d at 294; *see also* Pet. Br. 23-25.

Third, all of these reasons highlight the fundamental conflict between the Eleventh Circuit's interpretation and the False Claims Act's *qui tam* provisions. The *qui tam* provisions are intended to "combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot and will not"—in other words, "'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Sanders*, 546 F.3d at 295 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 547 (1943), *superseded by statute as stated in Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 412 (2011)). Even the Eleventh Circuit acknowledged prompt combating of fraud as one of the False Claims Act's central purposes. Pet. App. 23a-24a. Yet, the court of appeals made subsection 3731(b) an outlier divorced from "'the purpose and context of the statute,'" *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7

(2011), by allowing (and thus encouraging) relators to wait the full ten years allowed. *See Sanders*, 546 F.3d at 295; *Sikkenga*, 472 F.3d at 725-726; *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996) (allowing *qui tam* relators to "wait a full ten years after learning of the deceit before suing" would "frustrate the purposes of a limitation period and the purposes of the [False Claims] Act").

Respondent makes much of the fact that Congress intended *qui tam* relators to be able to bring a False Claims Act suits even when the government has declined to intervene. Resp. to Pet. 15-17; *see also* Pet. App. 25a. But no one disputes that. The question here is whether relators may *wait* to bring an action under subsection 3731(b)(2), when Congress intended relators to promptly file the suit, added subsection 3731(b)(2) specifically to benefit the government, and provided that the additional limitations period be available only when a government official "charged with responsibility to act" is involved. Under the logic of *Graham County*, the answer is clearly "No."

II. Applying Subsection 3731(b)(2) In Relator-Only Cases Imposes Significant Burdens On False Claims Act Defendants

The practical consequences of the Eleventh Circuit's decision further counsel against affirming the judgment below.

A. This Court has repeatedly emphasized that statutes of limitations "embody a 'policy of repose, designed to protect defendants'" by fostering "'elimination of stale claims.'" *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014); *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) ("Most statutes

of limitations seek primarily to protect defendants against stale or unduly delayed claims."). They provide, in other words, the "'security and stability to human affairs'" that are "'vital to the welfare of society.'" *Gabelli* v. *SEC*, 568 U.S. 442, 448-449 (2013). And they "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* at 448.

Companies that conduct business with the government are entitled to the security and stability that reasonable limitations periods provide. They should not have to face stale claims and suffer the reputational injury of being accused of fraud while being hindered in defending themselves by the loss of evidence inevitably caused by long delays.

Congress made the judgment that an additional limitations period is appropriate when the government learns of a violation late but determines that the alleged fraud is worth pursuing. But it did not intend relators to drag their feet for up to a decade. On the contrary, the incentives Congress established in the False Claims Act's *qui tam* provisions are intended to encourage the prompt filing of claims. *See supra* pp. 13-14.

B. Extending subsection 3731(b)(2) to non-intervened suits is particularly costly for False Claims Act defendants because of their duration and the discovery burdens they impose. Every year, *qui tam* relators file hundreds of suits. *See* DOJ, *Fraud Statistics—Overview: October 1, 1986 – September 30, 2018*, at 1 ("2018 Fraud Statistics"), https://www.justice.gov/civil/page/file/1080696/download (visited Jan. 9, 2019). In fiscal year 2018 alone, relators filed 645 new False Claims Act actions, and the number of new *qui tam*

complaints per year has remained above 600 every year since 2011. *Id.* The United States typically intervenes in only about a quarter of *qui tam* cases, leaving the vast majority to be litigated by relators on their own. *See* Pet. App. 9a n.4.

The sheer volume of non-intervened *qui tam* suits exacerbates the burdens of defending against those claims. False Claims Act litigation touches on nearly every sector of the economy, including healthcare, defense, education, finance, and technology. And they last a long time. As the Chamber noted in another amicus brief recently filed before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. *See* Chamber of Commerce Br. 13, *Gilead Scis., Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). Those years, added to the longer limitations period in subsection 3731(b)(2), means that companies may frequently litigate claims based on events that are well over a decade old.

The burdens of such litigation are not hard to see. According to a 2018 government survey, the median tenure for wage and salary workers in the private sector was only 3.8 years. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure 2018*, at 2 (Sept. 20, 2018), https://www.bls.gov/news.release/pdf/tenure.pdf. Within a ten-year period, therefore, a typical employee in the private sector will likely have changed jobs twice. As a result, defendants and courts would have to "deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading

memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). *Cf.* Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-1265 (2008) ("[M]ost non-intervened suits exact a net cost on the public.").

Discovery for such cases also imposes many practical challenges. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1029-1030 (D.C. Cir. 2017). Indeed, it is not surprising that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

The Eleventh Circuit suggested that the discovery burdens occasioned by its view of subsection 3731(b)(2) is overstated because the government's knowledge may be relevant to other defenses, such as showing that the defendant did not "'knowingly'" submit false claims or that the false statements were not "material" to the government's decision to pay. Pet. App. 22a-23a n.10 (citing 31 U.S.C. § 3729(a)(1) and *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)). But allowing relators to take advantage of the longer limitations period in non-intervened suits removes the threshold requirement that would have precluded any discovery on such issues in the first place. Those additional costs are undeniable.

C. The threat of discovery will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of the allegations. About 10% of non-intervened suits result in recovery, whether through settlement or final judgment, whereas 90% of intervened actions lead to recovery. Pet. App. 11-12a. The difference in those rates cannot be explained solely by reference to the merits of the claims, *see id.* 12a n.6, but the correlations between the merits and the recovery rate cannot be ignored, either. If relators can lengthen their limitations periods under subsection 3731(b)(2) even when the government has not intervened, False Claims Act litigants are more likely to settle those suits for fear of financial and reputational risk, even though the suits are frequently meritless.

The cost of settlement in these circumstances can be enormous. As noted above, the number of new *qui tam* False Claims Act matters has increased significantly, from 385 filed in 2006 to 645 in 2018. *See* 2018 Fraud Statistics 1. By contrast, the number of government-initiated False Claims Act matters has remained relatively steady during this period, ranging from a low of 70 in 2006 to a high of 160 in 2008. (In 2018, there were 122.) *See id.* With the dramatic increase in *qui tam* suits, relators' recoveries have also increased dramatically. In 2006, non-intervened actions resulted in roughly $22 million in recovery; in 2018, relators recovered approximately $118 million in non-intervened suits. *See id.*

The difficulties of dealing with stale claims reach beyond financial risk, as businesses may also suffer reputational hardship from having to defend a False Claims Act suit. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices." Canni, *Who's Making*

False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All Qui Tam Plaintiffs Possess Direct Knowledge, 37 Pub. Cont. L.J. 1, 11 (2007). The reputational damages are worse if a relator's claims from long ago survive a motion to dismiss on limitations grounds. Such reputational risk, combined with financial harm, could lead some businesses to exit the government program altogether. *See* Memo. from Michael Granston, Dir., Commercial Litig. to Commercial Litig. Branch, Fraud Sec. 5 (Jan. 10, 2018) ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry"), https://www.fcadefenselawblog.com/wp-content/uploads/sites/561/2018/01/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf; Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), https://www.law360.com/articles/924706/dod-buying-group-pushes-house-panel-for-rules-reform.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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No. 18-315

In the Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF COALITION FOR GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Coalition for Government Procurement (Coalition) is a nonprofit, nonpartisan organization comprising small, medium, and large commercial contractors that sell products and services to the federal government. The Coalition has over 200 member companies covering a wide variety of industries. Its members include many of the top federal contractors and collectively account for a significant percentage of the sales generated through General Services Administration (GSA) and Department of Veterans Affairs contracts, including those awarded through the Multiple Award Schedules (MAS) program. According to the GSA website, MAS contracts alone are responsible for $45 billion in annual spending, representing approximately 10 percent of overall federal spending. Coalition members are also responsible for many other commercial items purchased annually by the federal government through other contractual mechanisms. The Coalition has been active for more than 35 years in bringing together public- and private-sector procurement leaders to work toward the mutual goal of common-sense acquisition.[1]

Various Coalition members have been subject to actions under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, brought both by relators and by the Government. The decision below exposes them to significant litigation risk by allowing relators to bring actions based on events that are up to a decade old. The

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[1]Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

Coalition therefore has a strong interest in how this Court interprets the FCA's statute of limitations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). In addition to treble damages, defendants are subject to civil penalties. *Id.* § 3729(a)(1). The penalties for FCA violations are significant. In 2017, the range of penalties nearly doubled—from $5,500-$11,000 to a new range of $10,781-$21,563 *per claim*. See Civil Monetary Penalties Inflation Adjustment for 2017, 82 Fed. Reg. 9131 (Jan. 3, 2017) (codified at 28 C.F.R. § 85.5). For contractors that are subject to numerous detailed statutes, regulations, and clauses, and that also submit numerous requests for payment to the Government over the course of contract performance, these penalties can be severe.

There are two mechanisms for bringing an FCA action. Section 3730(a) authorizes the Attorney General to investigate violations of Section 3729 and to bring civil fraud actions. Section 3730(b) allows private plaintiffs, also known as relators, to bring civil actions for violations of Section 3729 "in the name of the Government." The relator must file his or her complaint under seal, affording the Government the opportunity to investigate the allegations. 31 U.S.C. § 3730(b)(2). The Government may elect to intervene or may allow the relator to proceed independently, with the option to intervene or move to dismiss at a later junction. *Id.* § 3730(b)(4), (c). Without regard to whether the Government intervenes, a successful relator can recover attorneys' fees. 31 U.S.C. § 3730(d)(1), (2).

The FCA also includes two distinct statute-of-limitations periods. Section 3731(b)(1) provides that no civil action may be brought "more than 6 years after the date on which the violation of section 3729 is committed." Alternatively, Section 3731(b)(2) provides that no civil action may be brought

> more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

According to the prefatory phrase in Section 3731(b), both limitations apply to "[a] civil action under section 3730."

In the decision below, the Eleventh Circuit concluded that Section 3731(b)(2) applies to relators, even in cases in which the Government declines to intervene, on the basis of this prefatory phrase and the fact that the whistleblower provision is codified in Section 3730. Pet. App. 13a-14a. That conclusion is mistaken.

As this Court has explained, the FCA is "complex" and Section 3731(b) does not apply to "all actions under § 3730." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 417 (2005). As in the *Graham County* case, it would be "counterintuitive" (*id.* at 421) for the limitation period *for the relator* to begin to run at the time the relevant *government official* learns (or should learn) about the facts material to the alleged FCA violation. Under the Eleventh Circuit's view, the limitation period could be tolled despite the relator's knowledge if the Government did not learn of the material facts independently

of the relator. Or, conversely, the limitation period could begin to run without the relator's knowledge if the Government learned some of those facts independently of the relator. Either result would defeat the purpose of statutes of limitations, which is to regulate the behavior of the person filing the suit and to encourage plaintiffs to bring actions promptly.

Extending the limitation period up to 10 years would impose significant costs on defendants. Relators initiate about 85 percent of FCA cases, and the Department of Justice (DOJ) intervenes in only about 20 percent of these. Applying Section 3731(b)(2) to relators, therefore, would triple the number of suits subject to the lengthy 10-year tolling provision, from approximately one third of FCA actions to all of them.

Allowing relators to benefit from Section 3731(b)(2) would impose particularly high costs on government contractors. Government contracts are comprehensively regulated and include a multiplicity of complex provisions. Many of the legal requirements for government contracts present significant compliance challenges. For instance, government contractors are frequently required to certify that all aspects of contract performance—including aspects handled by subcontractors and lower-tier suppliers—fully comply with all applicable requirements. Although this Court has sought to allay "concerns about fair notice and open-ended liability" by emphasizing the strict application of the scienter and materiality requirements, numerous FCA actions alleging "garden-variety breaches of contract or regulatory violations" continue to be filed. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2002-2003 (2016). Applying the 10-year limitation period to

all FCA actions would magnify the litigation risk of government contracting.

Applying Section 3731(b)(2) to relators would also undermine government procurement policy. In recent years, Congress and Executive-branch procurement officials have attempted to promote access to commercial technology and technical innovation by reducing regulatory burdens and by creating a more favorable environment for "nontraditional" businesses to enter the government market. Extending the reach of Section 3731(b)(2) would subvert these efforts by further increasing the risks of government contracting.

ARGUMENT

A. The Tolling Provision Of Section 3731(b)(2) Applies To Relators Only When The United States Intervenes

The Eleventh Circuit held that the phrase "civil action under section 3730" includes all whistleblower FCA actions, reasoning that the *qui tam* provision is codified in Section 3730 and "nothing in § 3731(b)(2) says that its limitations period is unavailable" to relators in cases in which the Government has not intervened. Pet. App. 14a. On this point, the Eleventh Circuit agreed with the Ninth Circuit, which has characterized this prefatory phrase in 31 U.S.C. § 3731(b) as "clear and unambiguous." *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996). That view is inconsistent with the statutory text, history, purpose, and policy, as well as with precedent of this Court.

This Court squarely rejected the argument that "civil action under section 3730" is unambiguous in *Graham County*, which held that that term does not include civil actions for retaliation, even though such

actions are codified in Section 3730(h). 545 U.S. at 412. The Court identified anomalies that made the "literal text" of Section 3731(b) "ambiguous." *Id.* at 417. The Court noted, for example, that it would be "counterintuitive" to find Section 3731(b) applicable to retaliation claims because the limitation period is triggered by a "'violation of section 3729,'" which is an element of an FCA claim but not of a retaliation claim. 545 U.S. at 416-417 (quoting 31 U.S.C. § 3731(b)(1)).

The Eleventh Circuit's assertion that nothing in Section 3731(b)(2) precludes the application of the tolling provision to relators is equally flawed. Notably, the limitation period in that provision starts when the relevant "official of the United States" learns or should learn about "facts material to the right of action." As Judge Wilkinson has pointed out, this trigger "makes perfect sense when referring to an action brought by the government" but "makes no sense whatsoever" when applied to a relator's action, because the government's knowledge "does not notify the relator of anything." *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 294 (4th Cir. 2008). As a consequence, "that knowledge cannot reasonably begin the limitations period for a relator's claims." *Id.*

This view is consistent with the basic purpose of statutes of limitations, which is to "ensur[e] essential fairness to defendants" by "barring a plaintiff who has slept on his rights." *Am. Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 554 (1974) (internal quotation marks omitted). The Eleventh Circuit's view is *not* consistent with that purpose. In this connection, it is irrelevant that "the United States remains the real party in interest," as the court below observed (Pet. App. 19a), because the purpose of a statute of limitations is to

regulate the behavior of the person bringing the suit—in this circumstance the relator.

There is another textual reason why the Eleventh Circuit's decision is erroneous. The phrase "responsibility to *act*" in Section 3731(b)(2) refers back to the prefatory phrase describing the responsibility of the relevant DOJ official in the Civil Division to bring "[a] civil *action* under section 3730." This is consistent with the view of numerous courts that "the only government 'official . . . charged with responsibility to act' under the FCA is the Attorney General (or his designee within DOJ)." *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 608 (S.D.N.Y. 2013); see *id.* at 607 (citing cases). As Judge Wilkinson has explained, once this "government official" discovers facts supporting an FCA cause of action, his or her responsibility is "to see that the government brings or joins an FCA action within the limitations period," not "to ensure that a relator brings a timely FCA action." *Sanders*, 546 F.3d at 294.

There is more. When Congress enacted Section 3731(b)(2), it borrowed, almost verbatim, language in 28 U.S.C. § 2416(c), which tolls the general statute of limitations for civil actions brought *by the United States* until "facts material to the right of action" are actually or constructively known by an "official of the United States charged with responsibility to act under the circumstances." It is implausible that Congress intended to apply a provision that tolls civil actions brought by the Government to FCA actions brought by relators. That is especially true when one considers that Congress imposed numerous special procedural requirements on relators in Section 3730(b) that are not imposed on the Government in Section 3730(a).

Since the two types of actions are treated so differently, it can hardly be thought unusual for them to have distinct statutes of limitations.

Finally, in assessing whether the Eleventh Circuit's interpretation is correct, it should be borne in mind that 10 years is an extraordinarily lengthy limitation period for a civil action. For instance, the limitation period for fraud claims brought *by the Government* under the Contract Disputes Act of 1978, 41 U.S.C. § 7101 *et seq.*, is 6 years. See 41 U.S.C. § 7103(a)(4). The general statute of limitations for federal civil-penalty actions, 28 U.S.C. § 2462, is only 5 years, and it is not subject to a discovery rule for actions sounding in fraud. See *Gabelli v. S.E.C.*, 568 U.S. 442, 454 (2013). As for the fallback statute of limitations for civil actions arising under an Act of Congress enacted after December 1, 1990, it is only 4 years. 28 U.S.C. § 1658(a). These much shorter limitation periods make it unlikely that Congress would have intended to enact a 10-year limitation period for *all* FCA actions alleging a violation of Section 3729, in the great majority of which the Government is not even a party.

B. Extending The Statute Of Limitations To A Period Of Up To 10 Years Would Impose Significant Costs On FCA Defendants In General And Government Contractors In Particular

1. Allowing relators to extend the statute of limitations from 6 years to a maximum of 10 would have far-reaching consequences for all defendants. A large majority of FCA suits are filed by relators. Between fiscal year (FY) 2014 and FY 2018, relators filed an average of 677.6 FCA actions per fiscal year, or 84.32 percent of all such actions. See U.S. Dep't of Justice,

Civil Division, Fraud Statistics—Overview 1 (Dec. 21, 2018) (Fraud Statistics—Overview), https://tinyurl.com/y7r99qe5. In FY 2018, 645 of 767 FCA suits (84 percent) were filed by relators. *Id.*

The Government elects to intervene in relators' FCA suits only about 20 percent of the time. See, *e.g.*, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), https://tinyurl.com/77lht9k.[2] That means that approximately 67 percent of all FCA actions are *qui tam* actions in which the Government does *not* intervene. If relators were always allowed to invoke Section 3731(b)(2), defendants would be subject to three times the number of suits with a maximum limitation period of 10 years as they would be if relators in actions with no Government intervention were limited to the 6-year period in Section 3731(b)(1) (100% as opposed to approximately 33%).

The Government has stated that a decision not to intervene may be based on factors other than merit. See, *e.g.*, Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, on Factors for Evaluating Dismissal Pursuant to 31

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[2] Data released in response to a Freedom of Information Act request are consistent with this estimate and indicate that DOJ's rate of intervention has been declining in recent years, with an average intervention rate of 23.4 percent for the 10-year period between 2005 and 2014 and an average intervention rate of 22.4 percent for the 5-year period between 2010 and 2014. See Comment, Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. CHI. L. REV. 1559, 1563–1564 (2015).

U.S.C. § 3730(c)(2)(A) (Jan. 10, 2018), https://tinyurl.com/ycdd7tzr. But the disparity in recoveries from "intervened" and "non-intervened" FCA suits suggests otherwise. Between FY 2014 and FY 2018, an average of only 6.91 percent of recoveries came from non-intervened *qui tam* suits. Fraud Statistics—Overview at 1.

It is likely for this reason that courts often take into account the Government's intervention decision in assessing the materiality of a relator's allegations. See, *e.g.*, *United States* v. *Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir. 2017) (noting that the Government "immediately intervened" and finding allegations material); *United States ex rel. Petratos* v. *Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (noting that "in those six years, [DOJ] has taken no action against [defendant] and declined to intervene" and finding allegations immaterial). There is no question, therefore, that allowing relators to invoke Section 3731(b) will expose defendants to greater risk of being subject to meritless *qui tam* actions.

FCA actions that are eventually dismissed or withdrawn can impose significant costs on contractors, such as legal fees (including attorney's fees and discovery expenses), costs associated with internal investigations or investigations initiated by the Government that are abandoned, and reputational harm. These costs would all be enhanced by extending the statute of limitations to a period of up to 10 years for *qui tam* suits in which the Government does not intervene.

2. Allowing relators to extend the statute of limitations from 6 years to a maximum of 10 is harmful to all defendants, but it is uniquely detrimental to government contractors. In FY 2017, the Government recovered approximately $220 million in settlements

and judgments from Department of Defense (DoD) contractors. U.S. Dep't of Justice, Civil Division, Fraud Statistics—Department of Defense 2 (Dec. 19, 2017), https:// tinyurl.com/y9h3fy5f. Although healthcare fraud is the largest source of recoveries, the FCA has an outsized impact on government contractors because it imposes risks of investigation, litigation, and reputational injury that go well beyond actual settlements and judgments.

Government contracting is different from commercial contracting in many fundamental respects. Since they are financed with funds from the public fisc, government contracts are highly regulated. In addition to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 1.000 *et seq.*, and agency FAR supplements, contractors are subject to numerous enforcement statutes and regulations that are unique to the Government. Aside from the FCA, these include cost or pricing provisions such as the Truth in Negotiations Act, 10 U.S.C. § 2306a & 41 U.S.C. § 3501 *et seq.*[3]; various anti-kickback[4] and anti-bribery[5] statutes; domestic-

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[3] The Truth in Negotiations Act requires certain contractors (in negotiated, or non-commercial, procurement actions exceeding $750,000) to disclose "cost or pricing data"; to certify that the data are accurate, complete, and current; and to lower their prices to reflect any price increase caused by a defective disclosure. 10 U.S.C. § 2306a. These requirements apply to all contracts that are priced or performed on the basis of cost.

[4] The Anti-Kickback Act of 1986, 41 U.S.C. § 8701 *et seq.*, prohibits government contractors from accepting or soliciting bribes or kickbacks from businesses seeking a subcontracting contract.

[5] For example, federal law prohibits any person, including a contractor, from directly or indirectly giving, offering, or promising anything of value to agency officials for or because of any official

preference statutes like the Buy American Act, 41 U.S.C. § 8301 *et seq.*[6]; various regulations prohibiting the use of foreign counterfeit parts[7]; recently promulgated cybersecurity rules[8]; and more.

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act performed or to be performed by such official. 18 U.S.C. § 201(c)(1)(a).

[6] The Buy American Act requires the U.S. government to purchase only "unmanufactured articles, materials, and supplies" that "have been mined or produced in the United States" and only "manufactured articles, materials, and supplies" that have been manufactured in the United States "substantially all" from U.S. components, unless doing so is "inconsistent with the public interest" or would result in "unreasonable" cost. 41 U.S.C. §§ 8302(a)(1), 8303(a)-(b).

[7] DoD procurement regulations require government contractors to obtain electronic parts from the original manufacturer or an authorized aftermarket manufacturer, if possible. Contractors are obligated to vet contractor-approved suppliers and to "assume[] responsibility for the authenticity of the parts provided" by them. See Defense Federal Acquisition Regulation Supplement: Detection and Avoidance of Counterfeit Electronic Parts—Further Implementation, 81 Fed. Reg. 50,635 (Aug. 2, 2016).

[8] For instance, in 2016 the FAR was amended to include a new subpart and contract clause governing basic safeguarding of contractor information systems that process, store, or transmit federal contract information. Federal Acquisition Regulation: Basic Safeguarding of Contractor Information Systems, 81 Fed. Reg. 30,439 (May 16, 2016) (codified at 48 C.F.R. subpt. 4.19 and 48 C.F.R. § 52.204-21). Later in 2016, the National Archives and Records Administration issued a final rule for managing controlled unclassified information. Controlled Unclassified Information, 81 Fed. Reg. 63,324 (Sept. 14, 2016) (codified at 32 C.F.R. Part 2002). Also in 2016, DoD promulgated a final rule on contractor reporting of network penetrations and DoD policies and procedures regarding purchases of cloud computing services. Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services (DFARS Case 2013-D018), 81 Fed. Reg. 72,986 (Oct. 21, 2016) (codified at

Many of these statutes and regulations require government contractors to "flow down" provisions to suppliers and to police their supply chains to address concerns about source of origin, counterfeit parts, and cybersecurity, among other things. In our modern, globalized economy, in which many companies have far-flung, international supply chains, these requirements can impose enormous costs and compliance risks. Even with sophisticated internal controls and compliance systems, for instance, a contractor may be slow to learn that one of its subcontractors has changed its sourcing and is now in violation of one of these requirements.

Under the precedent set by this Court in the *Escobar* case, government contractors implicitly certify compliance with *all* regulatory requirements that are material to payment. 136 S. Ct. at 1999. This regulatory thicket imposes enormous FCA risks on government contractors, as there is no foolproof way of guessing in advance which of the litany of requirements might be found material in the event of a lawsuit. Allowing relators up to 10 years to file suit would only magnify this litigation risk.

Although *Escobar* emphasized that the FCA is "not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations" (136 S. Ct. at 2003 (internal quotation marks and citation omitted)), relators persist in pursuing such claims against government contractors and other recipients of federal funds—even in the face of opposition from the responsible regulatory agency.

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48 C.F.R. subpt. 204.73 and 48 C.F.R. § 252.204-7008 and -7012). Notably, all of these provisions apply to contracts for commercial goods and services, with the exception of contracts solely for the acquisition of commercial off-the-shelf items.

For example, in 2015 a federal district court in Texas awarded more than $660 million in damages to a relator based on the defendant's purportedly inadequate disclosures about its guardrail design to the Federal Highway Administration (FHWA). *United States ex rel. Harman* v. *Trinity Indus. Inc.*, 872 F.3d 645, 652 (5th Cir. 2017). Although FHWA—the government agency with regulatory responsibility for the underlying issue—consistently supported the defendant and issued a memorandum shortly before trial stating that it had "validated" the safety of the defendant's guardrails, the court allowed the case to proceed to trial. *Id.* at 650. While the defendant ultimately prevailed on appeal, *id.* at 650-51, it did so only after years of litigation, which caused it to incur millions of dollars in attorneys' fees and business losses.[9]

Relators also continue to pursue claims based on legal theories that are inconsistent with the conduct of the relevant regulatory agency at the time of the events at issue. For instance, in *United States ex rel. Campie* v. *Gilead Sciences Inc.*, 862 F.3d 890 (9th Cir. 2017), cert. denied, 2019 WL 113075 (Jan. 7, 2019), two former employees alleged that Gilead Sciences, a pharmaceutical company, made false statements in the course of obtaining Food and Drug Administration (FDA) approval for several HIV drugs, for which the

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[9] The legal costs incurred by Trinity Industries have not been made public, but the district court awarded the relator nearly $19 million in attorneys' fees in 2015. Litigation continued through September 2017, and the defendant had a larger legal team than the relator, so the fees it incurred were likely considerably higher. See Mark Curriden, *Fight or settle? Dallas' Trinity Industries taking big chance in court to save face and massive fine*, DALLAS MORNING NEWS, Oct. 2016, https://www.dallasnews.com/business/business/2016/10/28/trinity-industries-goes-win.

company later sought reimbursement through federal programs such as Medicare and Medicaid. *Id.* at 896–898. In the Ninth Circuit appeal, the company pointed out that the FDA was aware of the alleged regulatory violations for years and never retracted its approval or ordered that distribution of the drugs be halted. At all times relevant to the relators' claims, moreover, the government customers consistently paid for the drugs at issue and never sought a refund. *Id.* at 904-907. Nevertheless, the Ninth Circuit reversed the district court's dismissal of the case. After Gilead Sciences petitioned for certiorari, this Court invited the Solicitor General to file an *amicus curiae* brief, in which DOJ belatedly conceded that the relator's allegations were meritless, as the agency had already investigated the claims, and announced its intention to exercise its authority under 31 U.S.C. § 3730(c)(2)(A) to unilaterally dismiss the case upon remand. Brief for United States as *Amicus Curiae* at 15-16, *Gilead Sciences Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018), 2018 WL 6305459, at *15-16.

Finally, in addition to increasing FCA litigation risk, lengthening the limitation period would impose enormous record-keeping burdens on government contractors. Pursuant to FAR 4.703, 48 C.F.R. § 4.703, for example, contractors are generally required to retain records for a period of up to 3 years after final payment. Disposing of records could leave a contractor unprepared if it were surprised by an FCA suit filed many years later, such as the one by the relator here. Applying Section 3731(b)(2) to relator suits in which the Government has not intervened would thus further raise the administrative costs of performing government contracts and deter companies from government work. While it is true that the Government is covered by Section 3731(b)(2) whether or not relators

are, an FCA action initiated by the Government typically arises in connection with an existing audit, investigation, or dispute, and therefore will be less likely to come as a surprise than a meritless *qui tam* suit in which the Government does not intervene.

C. Applying Section 3731(b)(2) To Relators Would Undermine Government Policy And Interfere With Agency Procurements

Over the past 25 years, Congress and the acquisition community have been engaged in an ongoing effort to promote and facilitate public contracting with commercial companies that possess or are developing new technologies and services that do not have a long history in government contracting. In the early 1990s, for example, policymakers recognized that the growing complexity and scope of contract clauses and regulations were imposing significant costs and regulatory risks that discouraged commercial companies with important technologies or critical knowledge and skills from working with the Government. To address these problems, Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355.

FASA established a statutory preference for the acquisition of "commercial items" (including not only physical items but also services). 10 U.S.C. § 2377(a); 41 U.S.C. § 3307(b). It also sought to reduce and minimize the number of contract clauses mandated by statute and regulation. Initially, this effort was successful—in 1996, FAR 30-5, 48 C.F.R. § 52.212-5 (1996), included only 17 clauses based on provisions of law or executive orders, only 5 clauses based on executive orders that applied specifically to services, and

only 5 that flowed down to subcontractors. But following a proliferation of executive orders and other laws in the past decade, the number of clauses in these three categories has increased to 60, 10, and 19, respectively. See FAR 52.212-5(b), (c), (e), 48 C.F.R. § 52.212-5(b), (c), (e).

In part to counteract this trend, Congress recently has encouraged agencies within DoD to use non-procurement contracting mechanisms to expedite access to commercial technology and resources. One example is the expansion and promotion of "other transaction authority" (OTA) as an approach to acquire technology and resources not otherwise available to the Government. In contrast with traditional "procurement contracts," OTA transactions are not subject to the FAR and its supplements, the Cost Accounting Standards, 48 C.F.R. § 30.000 *et seq.*, the Truth in Negotiations Act, the Buy American Act, the Bayh-Dole Act, Pub. L. No. 96-517, and numerous other onerous procurement requirements. See, *e.g.*, L. Elaine Halchin, *Other Transaction (OT) Authority*, Congressional Research Service, July 15, 2011, at 19-21, https://tinyurl.com/y8tdu8ub. This flexible OTA approach has been used by the National Aeronautics and Space Administration since the enactment of the National Aeronautics and Space Act of 1958. Pub. L. No. 85-568, § 203(b)(5)-(6). In the National Defense Authorization Act (NDAA) for FY 1994, Congress authorized the Defense Advanced Research Project Agency to use OTA agreements for the prototyping of weapons systems. Pub. L. No. 103-160, § 845.

In the years that followed, Congress repeatedly expanded the use of OTA agreements for defense procurements. In the NDAA for FY 1997, for example, Congress extended the use of OTA to all agencies

within DoD. Pub. L. No. 104-201, § 804. In the FY 2002 NDAA, Congress sought to streamline the use of OTA instruments and to make them more attractive to industries by authorizing the use of sole-source, follow-on agreements for prototype OTA agreements. Pub. L. No. 107-107, § 822. In the FY 2015 NDAA, Congress expanded the use of prototype OTA agreements beyond weapons systems, authorizing DoD to use OTA for any prototype project that is directly relevant "to improvement of platforms, systems, components, or materials in use by the armed forces." Pub. L. No. 113-291, § 812. In the FY 2016 NDAA, Congress made DoD's authority permanent, codifying it in Section 2371b of Title 10. Pub. L. No. 114-92, § 815. This provision also included a requirement to use "nontraditional defense contractors," small businesses, cost-sharing, or "innovative business arrangements or structures" such as consortia. *Id.* Finally, in the FY 2018 NDAA, Congress increased the dollar thresholds for approvals of OTA agreements by DoD officials. Pub. L. No. 115-91, § 864.

Notwithstanding this effort to encourage innovation through the use of more lightly regulated OTA agreements, one of the most significant barriers to attracting technology companies to government work is the threat of FCA litigation. The FCA applies to government expenditures regardless of the form of the instrument and thus covers OTA agreements.[10] Allowing relators to file FCA actions as long as 10 years from the time of any alleged violation would further

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[10] DoD OTA is codified in Chapter 138 (Research and Development) of Title 10 and is not subject to most rules governing "procurement contracts," which are codified in Title 41 or in Chapter 137 ("Procurement Generally") of Title 10. OTA contracts are subject to the FCA, however, and to many fiscal laws like the Anti-Deficiency Act, which are codified in Title 31.

discourage technology companies, commercial companies, and nontraditional contractors from accepting business with U.S. agencies. It may also encourage firms that have already accepted government work to reassess their risk profile and pull back from the government market.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 18-315

IN THE SUPREME COURT OF THE UNITED STATES

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION

Petitioners,

v.

UNITED STATES OF AMERICA *EX. REL.* BILLY JOE HUNT,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF OF DRI-THE VOICE OF THE DEFENSE BAR AND THE PROFESSIONAL SERVICES COUNCIL–THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

DRI – The Voice of the Defense Bar (www.dri.org) is an international organization composed of more than 22,000 attorneys who defend the interests of industries, businesses, and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of the civil defense bar; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* in carefully selected cases in which this Court is presented with questions that are exceptionally important to civil defense attorneys, their clients, and the conduct of civil litigation.

The Professional Services Council–The Voice of the Government Services Industry ("PSC") is the national trade association for the government professional and technology services industry. Many of PSC's more than 400 small, medium, and large member companies directly support the U.S. government through contracts with the Department of Defense and other national security and humanitarian-related federal departments and agencies, both domestically and abroad. Collectively, the association's members

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* themselves provided any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

employ hundreds of thousands of Americans in all 50 States and abroad.

Amici and their members represent those in the healthcare, defense, education, and government-services industries that are frequent targets of False Claims Act suits. The limitations issue presented by this case has the potential to increase litigation costs and uncertainty for *amici*'s members, particularly in connection with stale claims. *Amici* are concerned that these additional burdens and the increased difficulty in disposing of non-meritorious claims through motion practice will increase pressures to settle unmeritorious claims and, ultimately, increase the cost of providing government services.

This Court should not adopt the Eleventh Circuit's decision because it would give new life to stale claims that would otherwise have been time-barred under the six-year statute of limitation in Section 3731(b)(1). Such a rule would also impose significant practical obstacles for defendants and the U.S. government raising a limitations defense in relator-initiated cases, because its application depends on the knowledge of a United States official even in a non-intervened case, thus making a ruling on the limitations issue practically impossible until after protracted discovery.

SUMMARY OF ARGUMENT

This Court has diplomatically observed that the False Claims Act ("FCA") statute of limitation "could have [been] drafted [] with more precision," cautioning against simplistic readings that fail to account for the "[s]tatutory language" providing "context" to the meaning of this provision. *Graham County Soil and Water Conservation Dist. v. United States ex rel.*

Wilson, 545 U.S. 409, 415, 422 (2010). More generally, this Court has recognized that expansive readings of the FCA can create "almost boundless" liability. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008). Given the FCA's potential for abuse, this Court has instructed courts to "strike a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quoting *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010)). One important constraint on the FCA's potential for abuse is its statute of limitation. The Eleventh Circuit failed to strike the correct balance when it ruled that the knowledge of a United States agent could extend the limitations period for an FCA action pursuant to Section 3731(b)(2) even if the United States does not intervene in the case.

The Eleventh Circuit misapplied the FCA statute of limitation. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1083 (11th Cir. 2018). Under that court's approach, a private relator, normally subject to a six-year statute of limitation, could extend the limitations period to ten years simply by waiting to tell the government of its claim. Such an interpretation is not only counter to the limitations provision, it undermines the policy goals of the FCA and imposes considerable costs on government contractors and the U.S. government itself.

One of the primary purposes of the *qui tam* provisions in the FCA is to incentivize private individuals to promptly inform the government of potential fraud. The Eleventh Circuit creates a

countervailing incentive to hide claims from the government and so extend the limitations period.

Allowing the limitations period of Section 3731(b)(2) to govern a non-intervened suit also would create significant practical obstacles for defendants raising the limitations defense, and so increase the cost of defending against non-meritorious actions. Because the success of the defense would necessarily turn on the knowledge of a United States official—notwithstanding that the United States has declined to intervene in the suit and is not a party—limitations questions will require extensive third-party discovery from the government and be essentially impossible to resolve through early dispositive motions. The practical demands of intensive discovery and evidence-dependent motion practice will necessarily force government contractors to settle more non-meritorious claims, which ultimately increases the cost of providing government services. It will also impact the daily operations of government agencies and hamper those agencies' main missions—fulfilling statutory and administrative requirements—in favor of expending time and resources on stale cases, including precisely those cases the government considered insufficiently meritorious in which to intervene.

Amici respectfully urge the Court to restore the balance between encouraging fraud reporting and discouraging parasitic filings by holding that Section 3731(b)(2) does not control non-intervened suits. The Court should reverse the decision below to give effect to one of the FCA's constraints against "almost boundless" liability—its limitations period—and to ensure federal contractors and agencies alike are not

burdened by the uncertainty and costs associated with stale suits.

ARGUMENT

I. The FCA's Breadth and Harsh Penalties Make It Subject to Private Litigation Abuse

The FCA encourages private citizens to sue companies defrauding the federal government, rewarding citizens handsomely if their lawsuits generate settlements or awards. The FCA provides for large mandatory fines, including an automatic trebling of the amount in dispute, plus high per-incident fines and attorney fees, to punish those who commit fraud against the government and to deter others from such conduct. 31 U.S.C. § 3729(a). These penalties make liability "essentially punitive in nature." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). The private relator who brings the action keeps up to 30% of the award. *See* 31 U.S.C. § 3730(d). Because the fines are calculated on a per-violation basis and damages are trebled, the awards for a relator increase with the length of time the violation occurs.

These incentives have led to important recoveries for the government and payouts to inside whistleblowers who uncovered actual and significant fraud. *See generally* John T. Boese, Civil False Claims and Qui Tam Actions (4th ed. 2011); U.S. Dep't of Justice, Press Release, *Justice Dep't Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018) ("2018 FCA Press Release"), https://tinyurl.com/ycrvbfv2. However, the opportunity for individuals to invoke the threat of FCA's harsh penalties to generate tremendous

payouts has led to a long history of litigation abuse. *See id.* As this Court has observed, the FCA's strong penalties are not appropriate in many situations. *See, e.g,. Schindler Elevator Corp.*, 563 U.S. at 413.

A. History of the FCA

Congress enacted the FCA, originally called "The Informer's Act," in 1863 to prevent unscrupulous contractors from fraudulently selling provisions to the Union Army during the Civil War. *See* Boese, *supra*, at 1-6; Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 Okla. B.J. 901, 901 (2005) (providing examples of decrepit mules, faulty rifles, and rancid rations). Often, war profiteers acted with impunity because the scale and complexity of war made prosecuting frauds too onerous. The 1863 Act included several features of the modern FCA: it applied to any fraud against the government, imposed penalties for each false claim, and authorized damages as a multiple of the government's loss. *See* Act of March 2, 1863, 12 Stat. 696-98.

Broad judicial interpretation of the FCA, however, has created openings for litigation abuse. *See* Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 Harv. J. on Leg. 315, 337-35 (2014). When government involvement in the economy expanded through the New Deal and pre-World War II military buildup, this Court lowered the bar for the information needed for bringing a *qui tam* action. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The result was a dramatic increase in "parasitic" *qui tam* suits, as people found ways to game the system. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80

(D.C. Cir. 1997) (recounting FCA's history). Some relators filed suits based on copying criminal indictments they played no role in helping to bring. *See id.* In 1943, Congress responded by requiring relators to base claims on information the government did not possess. *See* False Claims Act of 1943, Pub. L. 78-213, 57 Stat. 608, 608-09.

Over the past 30 years, Congress has amended the FCA to address reports that fraud was pervasive in government contracts. The concept of unscrupulous government contracting was popularized again in the 1980s, when contractors allegedly overcharged the military as much as $435 for a hammer, $640 for a toilet seat, and $7,600 for a coffee maker. *See* United Press Int'l, *Navy Paid $900 for Plane Ashtray*, Sun Sentinel, May 30, 1985. Similar reports led the Departments of Defense and Health and Human Services to triple their investigations into fraudulent claims. S. Rep. No. 99-345, p. 2 (1986). Congress responded by enacting the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

Through these amendments, Congress broadened the availability of FCA claims to more potential relators and increased the incentives. *See* 31 U.S.C. § 3730(e)(4)(B) (no longer requiring relators to be "insiders" with new information or first-hand knowledge of the alleged violation); 31 U.S.C. § 3729(a) (increasing per incident fines to their current level of $5,500 to $11,000 for each violation); 31 U.S.C. § 3730(d) (allowing the relator to keep up to 15% to 25% of the recovery when the government intervenes and up to 30% when the government declines to intervene).

Congress again updated the FCA to address new types of fraud after the financial crisis in 2009 and 2010. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. 111–21, 123 Stat. 1617; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, § 1079A, 124 Stat. 1376, 2079 (amending 31 U.S.C. § 3730(h)); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. X, § 10104(j)(2), 124 Stat. 119, 901-02 (2010) (amending 31 U.S.C. § 3730(e)).

B. *Qui Tam* Lawsuits Are on the Rise

The FCA amendments have resulted in a growing *qui tam* bar and a record rise in *qui tam* lawsuits. In the mid-1980s, relators filed only a few dozen *qui tam* actions per year. *See* U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://tinyurl.com/ybfoto57 ("2017 Fraud Statistics") (reporting 30 *qui tam* actions in 1987). From the mid-1990s through 2009, an average of 300 to 400 *qui tam* suits were filed each year, with the DOJ initiating only about 150 claims each year. *See id.* Since 2009-2010, government filings have remained constar , but the number of *qui tam* filings has nearly doubled, with 706 filings in 2016, 674 in 2017, and 645 in 2018. *See id.*; 2018 FCA Press Release. Whereas the government will not intervene in every case, relators have no duty to exercise fair judgment—even a marginal FCA claim has potential value to them. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("relators are . . . less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). The government declines to participate in

about 75% of relator-initiated claims,[2] often a sign that a given case lacks merit. *See, e.g., United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) (stating that the non-intervened claims "presumably lacked merit"); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 242 n.31 (1st Cir. 2004) ("[T]he government's decision not to intervene in the action also suggested that [relator's] pleadings of fraud were inadequate."). These claims are nevertheless expensive and burdensome to defend, often producing settlements irrespective of the merits.

II. Allowing Relators to Take Advantage of Subsection 3731(b)(2) Is Contrary to the Purpose of the *Qui Tam* Provisions of the FCA.

Reading 31 U.S.C. § 3731(b)(2) to apply to non-intervened suits is inconsistent with the very purpose of the FCA's *qui tam* provisions. The FCA authorizes *qui tam* actions "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not—to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 295 (4th Cir. 2008) (quoting *Hess*, 317 U.S. at 547);

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[2] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1719 (2013); Memo, U.S. Dep't of Justice, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018) ("2018 Dismissal Memo") (noting that while the number of *qui tam* filings have "increased substantially," "the rate of intervention has remained relatively static").

United States ex rel. Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702, 725 (10th Cir. 2006) ("Congress viewed qui tam prosecutions as providing a means to achieve rapid exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities."). In reviewing the history of the *qui tam* provision, the Senate noted that "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain" because such enforcement relies on "the enterprising privateer" rather than "the slow-going public vessel." S. Rep. No. 99-345, p. 11 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

But without an effective time bar, relators will have significant incentive to delay bringing their claims: the potential for larger damages and penalties and thus larger financial rewards for the relators. Sophisticated *qui tam* relators and their advocates would capitalize on these incentives to *delay* filing suit, to the detriment of the FCA's goal of promoting the efficient termination of fraud against the government. The FCA's statute of limitation complements and promotes the FCA's objectives by encouraging private individuals to report purported fraud to the government expeditiously.

III. A 10-year Statute of Limitation Will Increase Litigation Costs to the Government and Businesses.

Statutes of limitation provide vital "security and stability to human affairs." *Gabelli v. SEC*, 568 U.S.

442, 448-49 (2013) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); *accord Artis v. D.C.*, 138 S. Ct. 594, 607-08 (2018) (concluding that statutes of limitation that are "'fundamental to a well-ordered judicial system'") (quoting *Board of Regents of University of State of New York v. Tomanio*, 446 U.S. 478, 487 (1980)). They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 568 U.S. at 448 (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)).

The Eleventh Circuit's interpretation of Section 3731(b) forces businesses to choose between defending stale FCA claims with less evidence—due to the normal processes of fading memories and document loss—or incurring the costs of retaining institutional knowledge and documents related to every government contract for the entire limitation period. Because the Eleventh Circuit rule focuses on what the government knew and when, the "innumerable [discovery] headaches" necessitated by applying subsection 3731(b)(2) to non-intervened suits would fall on the government as well. *Sanders*, 546 F.3d at 295.

"'Documents create a paper reality we call proof.' The absence of such documentary proof may stymie the search for the truth." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003). Extending subsection 3731(b)(2) to non-intervened suits would only increase the evidentiary demands on both FCA defendants and government agencies. As the Fourth Circuit concluded, such an interpretation would force

defendants "to seek out and litigate the identity and knowledge of a government official not a party to the action. And government agencies would be subjected to disruption and expense in responding to discovery requests in actions in which the government affirmatively chose to avoid those concerns by declining to intervene." *Sanders*, 546 F.3d at 295. In short, the Eleventh Circuit's statutory interpretation would increase discovery burdens by focusing the limitations inquiry on a *third-party's knowledge* over a period up to ten years.

Through normal processes, access to documentary proof will wane, impeding the ability of parties and courts to reach just results. Given the vast number of electronic records now created on a daily basis, most if not all large organizations delete records or transfer them to less accessible storage over time, often automatically according to regular document retention and destruction policies. Destruction of business records in compliance with valid document retention policies is "common in business" and perfectly legal under normal circumstances. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005). This Court has recognized how normal document retention policies impact the availability of documentary evidence. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (noting that the "Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years"); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2241 n.19 (2016) (Thomas, J. dissenting) (acknowledging the University of Texas's current 5-year records retention policy for student records in assessing what fact-

finding could be done to compare categories of applicants). If a relator waits to bring suit for up to a decade under the Eleventh Circuit's rationale, it is more likely that relevant documents no longer will be available.

Despite all efforts of contractors to maintain records, government retention policies will affect the availability of agency records that could be vital to demonstrate government knowledge (and the related commencement of the limitations period) or liability. Normal governmental retention policies have resulted in the destruction of discoverable information in FCA suits. *See, e.g., United States v. Taber Extrusions L.P.*, No. 4:00CV00255, 2001 U.S. Dist. LEXIS 24600, at *8-9 (E.D. Ark. Dec. 27, 2001); *United States ex rel. Baker v. Cmty. Health Sys.*, No. 05-279 WJ/ACT, 2012 U.S. Dist. LEXIS 146865 (D.N.M. Aug. 31, 2012). Such evidentiary issues will only be exacerbated if the subsection 3731(b)(2) ten-year repose period is extended to non-intervened suits brought by private relators.

Even without added burdens, the fact-intensive nature of FCA claims ordinarily requires extensive discovery from the relevant agencies. *See* David S. Torborg, *The Dark Side of the Boom: The Peculiar Dilemma of Government Spoliation in Modern False Claims Act Litigation*, 26 J. LAW & HEALTH 181, 184, 187-90 (2013). Extending the limitations period to capture otherwise barred claims only increases that burden on the government. And the Eleventh Circuit's approach injects into private cases yet another fact particularly within the records or knowledge of the government agency: when the

agency knew or reasonably should have known facts material to the right of action.

IV. Increased Litigation Costs and Punitive Liability Will Force More Unwarranted Settlements.

Many targets of FCA lawsuits engage in low-dollar, high-volume transactions in government-supported programs or with the government itself. Courts must be able to weed out groundless claims at the motion-to-dismiss stage. Otherwise, targets of *qui tam* suits likely will settle even meritless claims, as many do not have the resources to risk going to trial. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (appreciating that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). A loss, even if remote on the merits, could financially ruin a defendant and impose the high reputational cost of being labeled a fraudster.

Proving the date of the government's knowledge will be next to impossible at the motion-to-dismiss stage. A plaintiff need only plead that the alleged violation occurred within the last ten years. A defendant, on the other hand, may establish a limitations defense at the motion-to-dismiss stage only if the availability of the defense is plain and definitive from the face of the complaint. *Jones v. Bock*, 549 U.S. 199, 215 (2007) (noting that "[i]f the allegations . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim"); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); Fed. R. Civ. P. 8(c) & 12(b)(6). Even with relevant allegations in the complaint, the U.S. Court

of Appeals for the District of Columbia Circuit has recognized that there is "an inherent problem" in raising a statute of limitation defense at the motion-to-dismiss stage. *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981). Unless the applicability of the statute of limitation is definitive "beyond doubt" on the face of the complaint, *Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971), federal courts lean to allowing "both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal." *Richards*, 662 F.2d at 73.

Assuming an FCA plaintiff pleads an alleged date the government became aware of the purported violation, the plaintiff will not plead a date that is fatal to the claim. Only after discovery can the defendant develop evidence to demonstrate the claim's untimeliness. And even at the summary judgment stage it may be difficult to succeed, given the potential for faded memories, destroyed documents, and the death, disappearance, or unavailability of witnesses. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).

Accordingly, the expansion of subsection 3731(b)(2) to non-intervened suits puts higher pressure on defendants to settle, given the threat of extensive and time-consuming discovery, the risk of higher penalties due to longer periods of purported violations, and the difficulty of proving a limitations defense that focuses on the government's knowledge. The longer a defendant must wait to "lift the cloud on its reputation" from fraud accusations, the greater is the "undue pressure . . . to settle the case." *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016) (quoting *Fidelity*

National Title Insurance Co. of New York v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 749 (7th Cir. 2005)).

V. Implications for the Government

As set out above, an expansive reading of Section 3731(b) will burden the government even when it declines to intervene. *See* 2018 Dismissal Memo (noting that "[e]ven in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate"). Applying subsection 3731(b)(2) in non-intervened cases, in particular, injects into the litigation specific questions concerning the government's knowledge that may have no relation to any issue other than the limitations period. The added costs will come at the expense of the agencies' missions. Discovery requests require agencies to commit time and resources to reviewing and objecting to requests, retrieving and collecting documents, reviewing documents for relevance and for privilege, producing documents, and preparing agency witnesses for depositions and trial. *United States ex rel. Maldonado v. Ball Homes, LLC*, No. CV 5: 17-379-DCR, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018); *see also Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (noting that the FCA is designed to "encourag[e] the government to monitor relators' actions and step in when a relator is not acting in the best interest of the public" even when the government has decided not to intervene). Often agencies must also monitor filings to ensure there is no inadvertent disclosure of classified documents, file statements of interest,

participate in mediation or settlement negotiations, and participate as *amicus* on appeal. *See id.*

Interfering with agency management of its own contractors also compromises its ability to pursue the best results for the public. *See United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010). This problem is not merely theoretical. In one example, the government presented credible evidence that the *qui tam* litigation—even without intervention—would delay the clean-up and closure of a CERCLA Superfund site "by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to a review of classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up to litigation." *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 937 (10th Cir. 2005). More recently, the government expressed concern about the burdensome discovery requests that likely would be issued to the Food and Drug Administration to determine "exactly what the government knew and when"—leading the U.S. to take the unusual action of informing the Court it would seek dismissal of the relator's claim if the case were revived and remanded. See Br. for the United States as *amicus curiae* in *Gilead Sciences Inc. v. U.S. ex rel Campie*, 2018, No. 17-936, p. 15-16.

As one scholar has noted, "most non-intervened suits exact a net cost on the public." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation under the Civil False Claims Act*, 76

U. CINN. L. REV. 1233, 1264-65 (2008). A holding that subsection 3731(b)(2) does not apply in non-intervened cases will allow for earlier adjudication of limitations questions, reduce the discovery burden on government agencies, and diminish the distraction to federal agencies created by the increasing number of private FCA actions.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL.
BILLY JOE HUNT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* PROFESSOR JOEL D. HESCH IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Professor Joel D. Hesch is a tenured professor at Liberty University School of Law and an expert on the False Claims Act (FCA). He is the author of several scholarly articles relating to the FCA.[2] Professor Hesch has been previously authorized to submit amicus briefs in four other FCA cases before this Court.[3] From 1990 to 2006, Professor Hesch

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[1] The parties have consented to the filing of this brief and notice has been provided to counsel of record. No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission.

[2] Joel D. Hesch and Mia Yugo, *Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?*, 41 Am. J. Trial Advoc. 335 (2018); Joel D. Hesch, *Restating the 'Original Source Exception' to the False Claims Act's 'Public Disclosure Bar' in light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991 (2017); Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed under the False Claims Act*, 38 Seattle L. Rev. 901 (2015); Joel D. Hesch, *The False Claims Act Creates a 'Zone of Protection' That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 Drake L. Rev. 361 (2014); Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. Cooley L. Rev. 217 (2012).

[3] Brief for *Amicus Curiae* Professor Joel D. Hesch in support of Respondents, dated March 2, 2016, filed in *Universal Health Services, Inc. v. U.S. ex rel. Julio Escobar* (No. 15-7); Brief for *Amicus Curiae* Professor Joel D. Hesch in support of Petitioner, dated April 6, 2015, filed in *U.S. ex rel. Gonzalez v. Planned Parenthood of Los Angeles* (No. 14-1080); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of Respondents,

worked as a trial attorney in the Civil Fraud Section of the Department of Justice (DOJ), where he conducted nationwide FCA investigations affecting twenty different Government agencies. While at DOJ, he facilitated cases recovering more than one billion dollars, including the trial of *Rockwell v. United States*, 549 U.S. 457 (2007). He now teaches Civil Procedure as a professor and represents whistleblowers as a private attorney. Professor Hesch offers his scholarship and unique experiences with the FCA to aid this Court in ruling upon the circuit split pertaining to the FCA's statute of limitations.

SUMMARY OF ARGUMENT

The FCA's ten-year statute of limitations must be applied to declined *qui tam* complaints because it is patently clear that there is only one FCA statute of limitations to redress submissions of false claims to the Government, and it allows ten years provided that a FCA complaint is filed by relator or the Government within three years of when certain named Government officials with actual authority to act have knowledge of the fraud. At no point does the FCA seek to apply a separate statute of limitations for submission of false claims against the Government dependent upon whether they are raised by the Government or in a *qui tam* complaint, let alone whether a *qui tam* complaint is declined.

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dated January 22, 2008, filed in *Allison Engine Comp. v. U.S. ex rel. Sanders* (No. 07-214); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of Petitioner, dated June 26, 2014, filed in *U.S. ex rel. Gurumurthy Kalyanaram v. New York Institute of Technology* (No. 13-1444).

This plain reading of the statute is fully supported by two other FCA provisions impacting the statute of limitations. First, the FCA mandates that Government intervention in a *qui tam* complaint must relate back to the relator's filing. 31 U.S.C. § 3731(c). Second, the FCA allows the Government to intervene after declining. 31 U.S.C. § 3731(c)(3). These two FCA provisions are inconsistent with a court creating a separate statute of limitations for declined *qui tam* complaints. Moreover, creating a separate statute of limitations for declined *qui tam* complaints ignores the fact that the Government is the real party of interest in *qui tam* suits, *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009), and retains ultimate control over *qui tam* cases. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, the FCA grants the Government authority to dismiss a *qui tam* complaint for good cause, 31 U.S.C. § 3731(c)(2)(A), settle the *qui tam* complaint over the objection of the relator, *id.* at § 3731(c)(2)(B), and limit the relator's participation in the case upon a showing of good cause. *Id.* at § 3731(c)(2)(C) and (D).

In addition, because *qui tam* complaints, including declined *qui tam* complaints, redress an important Government interest, the FCA's statute of limitations must be strictly construed to accomplish the goal of recovering back all of the ill-gotten taxpayers' funds alleged in *qui tam* complaints. *Badaracco v. Comm'r*, 464 U.S. 386, 39 (1984). Indeed, the FCA is the Government's most important anti-fraud tool and *qui tam* complaints account for most of the FCA recoveries. In the last ten years

(2009-2018), *qui tam* complaints accounted for 90 percent of all healthcare fraud recoveries under the FCA, and in the last five years *qui tam* complaints consisted of 94.8 percent of all FCA healthcare recoveries under the FCA.[4] Declined *qui tam* complaints also play an important role, accounting for 4 percent of all FCA recoveries.[5] Because the Government has retained 83 percent of all funds recovered in *qui tam* complaints since 1986,[6] *qui tam* complaints are a vital component of the FCA and represent an important Government interest.

Moreover, there is no serious risk that an absurd result will occur by applying the statute of limitations as Congress crafted it. Indeed, Congress itself understood that a relator might otherwise have an incentive to delay filing and built into it sufficient safeguards. The FCA contains not one, but three separate provisions that fully account for any intentional delays by a would-be relator, i.e. first-to-file bar, 31 U.S.C. § 3730(b)(5), public disclosure bar, *id.* at § 3730(e)(4)(A), and Government action bar, *id.* at § 3730(e)(3), each of which de-incentivize a relator to delay. Accordingly, Congress was not unaware that there might be a risk that a relator might delay filing and addressed it appropriately. Thus, there is no need or room for this Court to rewrite the statute

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[4] These statistics are based on FCA data published by the Department of Justice, "Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2018, U.S. DEP'T OF JUSTICE," located at: https://www.justice.gov/civil/page/file/1080696/download. *See infra* note 14.

[5] *See infra* note 13.

[6] *Infra* note 15 and surrounding text.

of limitations to create a separate statute of limitations for declined *qui tam* complaints. To do so would only frustrate an important Government interest of recovering ill-gotten taxpayers' funds.

Petitioners' other so-called absurd result also rings hollow. Petitioners wrongly suggest that relators would enjoy a longer period of time than the Government if the ten-year provision applied to them. Petitioner Brief at 26. The ten-year provision is always exactly the same regardless of whether the case is initiated by relators or the Government. It extends to ten years only if a FCA complaint is filed (either by the Government or relators) within three years of when the named Government officials charged with authority to act have knowledge. The date of knowledge of such Government officials is the key and does not fluctuate depending upon whether relators file a *qui tam* complaint or the FCA case is initiated by the Government. Indeed, Congress intended this result because Government intervention will relate back to the filing of a *qui tam* complaint. 31 U.S.C. § 3731(c). Thus, a FCA suit must be initiated within three years of when the named Government officials charged with authority to act have knowledge. If a relator delays beyond three years of such Government knowledge, the relator cannot rely upon the ten-year rule. Nor would it cause headaches or difficult discovery to determine the date of such Government knowledge (Petitioners Brief at 32), because, as shown below, the date of such knowledge is limited to the Attorney General and his delegates, i.e. Assistant United States Attorneys, who have authority to address FCA allegations. These are the same Government officials

appearing in the FCA case. Thus, it is quite easy to know exactly when the fraud allegations were received by such Government officials because they open files for each FCA allegation. Therefore, it is simply a matter of the Government officials appearing in the FCA case disclosing the date they received the fraud allegations.

With respect to the second issue, whether the relator constitutes an "official of the United States charged with responsibility to act" the plain text of the FCA forecloses any such reading. It is clear on its face that Congress intended the three-year knowledge period to apply only to Government officials possessing actual authority to act, which cannot be a relator. Indeed, by law, only the Attorney General (and his delegates) has authority to compromise FCA allegations.[7] The Attorney General delegated authority to certain attorneys in the DOJ offices in Washington, D.C, and in cases with certain dollar thresholds to the U.S. Attorneys Offices. *See* Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under*

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[7] "The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. *See* [31 U.S.C.] § 3730 (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see also [31 U.S.C.] § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division)." Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 fn. 281 (2012).

the False Claims Act, 38 Seattle U. L. Rev. 901, 918 (2015) (citations omitted). Thus, the Government officials spoken of within the FCA's statute of limitations is limited to knowledge of the Government attorneys responsible for litigating FCA cases, i.e. attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C. and Assistant United States Attorneys. Thus, it is clear that an "official of the United States charged with responsibility to act" cannot include knowledge of the relator. Rather, the relator's knowledge only becomes relevant when he turns information over to a Government official charged with authority to act and puts them on notice of the fraud allegations, which triggers the three-year clock.

ARGUMENT

I. THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS NOT ONLY IS PLAIN AND UNAMBIGUOUS, BUT MUST BE STRICTLY CONSTRUED TO PROTECT RECOVERY OF FEDERAL FUNDS LOST TO FRAUD

There are two reasons why the FCA's statute of limitations must be interpreted as allowing ten years for *qui tam* complaints seeking the recovery of federal funds regardless of whether the Government ultimately intervenes in the case. First, the language is plain and unambiguous and must be given its stated meaning. Second, because the statute of limitations at issue operates to restrict the Government's interest in recouping taxpayers' funds lost to fraud, it must be strictly construed in favor of

maximizing the stated statute of limitations in protecting such Government interest.

A. The Statute of Limitations is Plain and Unambiguous in Providing a Ten-Year Period for *Qui Tam* Complaints

When "statutory text is plain and unambiguous" a court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). As shown below, not only is the language at issue plain and unambiguous, but there are other FCA provisions that make clear that Congress intended the ten-year statute of limitations to apply to both relator and Government filed complaints.

The FCA's statute of limitations reads:

> A civil action under section 3730 may not be brought--
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which

> the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b).

It is clear that for submissions of false claims against the Government the FCA's statute of limitations is a minimum of six year, but extends to ten years if a FCA complaint is filed within three years of when Government officials charged with authority to act have knowledge of the fraud.

At no point does the FCA seek to apply a separate statute of limitations for submission of false claims to the Government based upon whether the allegations are contained in a *qui tam* complaint or a case filed solely by the Government. In short, there is but one FCA statute of limitations to redress fraud against the Government, and it allows ten years provided that a FCA complaint is filed either by a relator or the Government within three years of when certain named Government officials possess knowledge of the fraud.

The FCA contains other provisions relating to the statute of limitations, which further demonstrate that there is not a separate statute of limitations based upon whether a *qui tam* complaint is intervened or declined. Congress included within the FCA a mandate that Government intervention must relate back to the filing of a *qui tam*, as follows:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file

> its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. § 3731(c) (emphasis added). By clarifying that Government intervention must relate back to the date of a *qui tam* Complaint, it leaves no doubt that there is but one statute of limitations for fraud against the Government, regardless of whether the case was initiated by a relator or the Government.

There is also a second FCA provision that further cements that Congress never intended there to be a separate statute of limitations dependent upon whether a *qui tam* complaint was declined. Specifically, the FCA allows the Government to join a *qui tam* case after declining, which reads:

> If the Government elects not to proceed with the action, the person who initiated the action shall have the right

> to conduct the action. *** When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

31 U.S.C. § 3731(c)(3).

It would lead to absurd results if a court created a separate limitation period just for declined *qui tam* cases. For example, assume a *qui tam* complaint alleges harm occurring over the past seven years and the Government declines. Now assume that a court holds that due solely to the fact that the *qui tam* case is declined, the statute of limitations is six not ten years, even though no Government official knew of the fraud prior to the filing of the *qui tam*. Under this approach, the relator may only proceed for the past six years. Now assume that one year later, after discovery has begun based upon the *qui tam* complaint, the Government is allowed to intervene for good cause. If there are two statutes of limitations—one for Government intervened *qui tam* complaints and another for Government declined *qui tam* complaints—the statute of limitations would automatically switch in the midst of the case the moment the Government intervened. That defies logic and finds no support within the language of the FCA.

The fact that the Government can always intervene after declining renders any interpretation based upon a declined *qui tam* status absurd. Going

one step further, even without Government declination, that approach would also mean that the day a *qui tam* suit is filed, the statute of limitations is six years but switches to ten years if the Government timely intervenes. The plain language of the FCA does not create a "limbo" statute of limitations either by word or intent. In fact, there is not a single word within the statute of limitations that allows for such an interpretation.

Finally, dividing up the statute of limitations into whether the case is the product of a declined *qui tam* complaint ignores the fact that the Government is always the real party interest. *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009). Even in a declined *qui tam* case it is the Government who suffered the loss. It remains a FCA complaint to remedy fraud against the taxpayers. In fact, this Court has held that the reason the *qui tam* provisions are constitutional is because it is the Government that sustained the injury and the Government retains ultimate control over the FCA allegations in a *qui tam* case. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, the FCA grants the Government the authority to (1) dismiss a *qui tam* complaint for good cause,[8] (2) settle the *qui tam* complaint over the objection of the relator,[9] and limit

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[8] 31 U.S.C. § 3731(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.").

[9] *Id.* at § 3731(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person

the relator's participation in the case upon a showing of good cause.[10]

For all of these reasons, the language of the FCA plainly and ambiguously created a single ten-year statute of limitations for submission of false claims against the Government, regardless of whether initiated by a *qui tam* complaint and regardless of whether the Government intervenes.

B. The FCA's Statute of Limitations Must be Strictly Construed to Protect, not Restrict, Recoveries of Taxpayer's Funds Lost to Fraud

There is a second reason why the ten-year statute of limitations applies to declined *qui tam* complaints. Specifically, statutes of limitations involving a Government interest must be strictly construed in favor of protecting the Government interest, and a declined *qui tam* complaint constitutes a Government interest.

Congress has the power to create whatever length of statute of limitations is desires to protect a particular Government interest. In fact, absent the Government enacting a statute of limitations, there is no limitation against the Government. *E.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is

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initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.").

[10] *Id.* at § 3731(c)(2)(C) and (D).

well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.").[11] When Congress does act, the "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco v. Comm'r*, 464 U.S. 386, 39 (1984). Because the Government is the "real party in interest" and the entity that suffered the harm, *Eisenstein*, 556 U.S. at 930, courts must strictly construed the FCA's statute of limitations in favor of recovering of taxpayers' funds lost due to fraud. That means that the ten-year limitation period should broadly (not narrowly) apply. Accordingly, courts cannot inject into the FCA's ten-year statute of limitations a new or unstated requirement that it only applies when the Government files suit or intervenes in a *qui tam* case. Not only does the FCA itself not impose such a restriction or requirement, but for a court to do so would improperly reduce the amount of taxpayers' funds recovered due to fraud and negatively impact an important Government right.

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[11] With respect to filing fraudulent tax returns, there is no statute of limitations. E.g., Payne v. Comm'r, 224 F.3d 415, 420 (5th Cir. 2000) ("The only exception to the general three-year limitations rule of § 6501(a) that is implicated in this appeal is § 6501(c)'s statutory tax fraud exception, which provides: 'In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.").

1. *Qui Tam* Complaints Constitute an Important Government Interest

There is no doubt that *qui tam* complaints redress an important Government interest and thus the statute of limitations must be strictly construed to accomplish the goal of recovering back all of the ill-gotten taxpayers' funds from *qui tam* cases. As much as ten percent of all federal Government spending is lost due to fraud. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 (2012). The chief tool to combat fraud is the FCA. *E.g., United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010). Within the FCA, *qui tam* suits are the most potent weapon. Since the modernization of the FCA in 1986, 72 percent of all of the Government's FCA recoveries were from *qui tam* complaints.[12] Declined *qui tam* complaints also play a prominent role, consisting of 4 percent of all FCA monetary recoveries.[13] The importance of *qui tam* complaints is growing stronger each year, especially in the healthcare sector. In the last ten years (1987–2018), *qui tam*

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[12] These statistics are based on FCA data published by the Department of Justice, "Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2018, U.S. DEP'T OF JUSTICE," located at: https://www.justice.gov/civil/page/file/1080696/download. The total FCA recoveries since 1986 amounted to $59 billion, of which *qui tam* cases accounted for $42.5 billion, consisting of 72 percent. *Id.*

[13] The total FCA recoveries (both *qui tam* and Government initiated) from 1986 to 2018 amounted to $59 billion and the total recoveries in declined *qui tam* cases amounted to $2.47 billion, equating to 4.18 percent. *Id.*

suits accounted for 90 percent of all healthcare fraud recoveries under the FCA, and in the last five years *qui tam* complaints consisted of 94.8 percent of all FCA healthcare recoveries under the FCA.[14]

The Government is also the real victor in *qui tam* complaints. Since 1986, of the $42.5 billion recovered in *qui tam* complaints the Government netted $35.5 billion by paying out relator awards of $7 billion.[15] Thus, the Government retained 83 percent of all funds recovered in *qui tam* complaints since 1986, which means that *qui tam* complaints, including declined *qui tam* complaints, are a vital component of the FCA and represent an important Government interest. Accordingly, the statute of limitations must be strictly construed in favor of an expansive interpretation and the ten-year FCA statute of limitations must be applied to declined *qui tam* complaints.

C. The Ten-Year Statute of Limitations would not Lead to Absurd Results when Applied to Declined *Qui Tam* Complaints

One reason for the circuit split is because some courts have mistaken this Court's ruling in *Graham*

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[14] The total FCA healthcare recoveries from 2009 to 2018 amounted to $24.1 billion and the total recoveries in *qui tam* healthcare cases amounted to $21.9 billion, equating to 90 percent. *Id.* The total FCA healthcare recoveries from 2014 to 2018 amounted to $11.6 billion and the total recoveries in *qui tam* healthcare cases amounted to $11 billion, equating to 94.8 percent. *Id.*

[15] *Id.*

County Soil & Water Conservation District v. United States ex rel. Wilson, 545 U.S. 409 (2005) as an invitation to substitute their own judgment for Congress anytime a theoretical absurd result might occur. The Fourth Circuit led the way by wrongly suggesting that a plain reading of the statute of limitations could lead to the absurd result of a potential relator intentionally delaying filing a *qui tam* case merely to increase the harm to the Government so that the award will be higher. *See U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008) ("a strong financial incentive to allow false claims to build up over time before they filed" suit, rather than immediately initiating litigation that would bring a prompt end to the defendant's fraud").

There are two reasons why *Graham* does not support the Petitioners nor allow this Court to rewrite the plain and unambiguous statute. First, *Graham* is clearly distinguishable. Second, there is no absurd result in applying the plain language of the statute.

In *Graham*, the statute of limitations at issue addressed a private cause of action in a different section of the FCA brought by the relator to redress retaliation as a whistleblower. 545 U.S. 409. The Court was not facing allegations of false claims against the Government. Because Congress had not included a statute of limitations for the private wrong, the Court ruled that it would be absurd to apply the FCA's statute of limitations affecting fraud against the Government. *Graham*, 545 U.S. at 417. Rather, the Court needed to apply a comparable

limitations period for private causes of action. *Id.* at 414. As such, the ambiguity whether the FCA statute of limitations applies to private causes of action for retaliation faced in *Graham* has no relevance to this case involving *qui tam* allegations of false claims against the Government.

In any event, there is no absurd result. The problem with the Fourth Circuit's relator delay theory is that it flies in the face of the structure of the FCA that already contains provisions that operate to eliminate this very risk. As an initial matter, this hypothetical delay problem can only apply if a relator purposefully sits on fraud allegations in years seven through ten, because the minimum statute of limitations is six years for a relator to file a FCA case. The purported concern is that a would-be relator might choose to wait between seven to ten years to file a *qui tam* complaint, instead of in years one through six, simply to accrue a few additional years of damages. Fortunately, Congress already solved this potential problem within the FCA through three separate provisions that de-incentivize relators from delaying in filing *qui tam* complaints.

First, the FCA has a "first-to-file" bar, which only allows the first relator to be eligible for an award. 31 U.S.C. § 3730(b)(5) ("no other person other than the Government may intervene or bring a related action based on the facts underlying the pending action"). In fact, the first to file bar actually creates a race to the courthouse among would-be relators. *E.g.*, *Campbell v. Redding Med. Center*, 421 F.3d 817, 821 (9th Cir. 2005) (The first-to-file bar "encourages

prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud."). Accordingly, it defies logic for a relator to forgo filing a case until years seven through ten just to add a year or two more because she would lose everything if another relator beats her to the courthouse. The real problem with this delay theory is that it assumes there is only one potential relator with knowledge of the fraud, when in fact, every employee of the wrongdoing company is a potential relator and they each have an incentive to become the first to file and not simply waiting seven to ten years so that the pot of gold might increase. In short, the waiting game is illusionary because any other relator can beat a delaying relator to the punch.

Second, a hypothetical relator playing the seven to ten year waiting game also risks losing out on any award due to the FCA's "public disclosure" bar. 31 U.S.C. § 3730(e)(4)(A) (2010). If the fraud allegations get publicly disclosed at any time prior to filing a *qui tam* case, the delaying relator is barred unless he satisfies the "original source exception." 31 U.S.C. § 3730(e)(4)(B) (2010). In short, Congress added the public disclosure bar as an added incentive for a relator to swiftly come forward, i.e. before a qualifying public disclosure, or face the task of establishing that his complaint materially adds to the public disclosure.[16] Thus, the public disclosure

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[16] "The 2010 original source exception can be met in one of two ways: either (1) a relator told the government about the fraud before a qualifying public disclosure, or (2) a relator's information is 'independent of and materially adds' to the public disclosure." Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991,

bar dramatically reduces any real problem of hypothetical relators purposefully delaying filing for seven to ten years.

Third, Congress added another poison pill within the FCA for relators who would seek to delay seven to ten years to file. The "Government action" bar prevents a relator from filing a *qui tam* complaint when the Government has a pending FCA case alleging the same fraud. 31 U.S.C. § 3730(e)(3) ("In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party."). Although most FCA cases are the product of *qui tam* complaints, the Government sometimes catches fraud and files suit without a *qui tam* being filed, such as receiving a tip from a whistleblower that chooses not to file a *qui tam* or through routine audits. If the Government files its own complaint first, a relator cannot obtain a reward. *Id.*

In sum, there is no serious risk that an absurd result will actually occur by applying the statute of limitations as Congress crafted it. Indeed, Congress itself understood that a relator might otherwise have an incentive to delay filing and built into it sufficient safeguards. The FCA contains not one, but three separate provisions that fully account for any intentional delays by a would-be relator. Accordingly, Congress was not unaware of this risk and addressed it appropriately. Congress also knew what it was

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doing when it drafted a single statute of limitations provision to apply to all FCA violations, regardless of whether initiated by the relator or the Government. Thus, there is no need or room for this Court to rewrite the statute of limitations to create a separate statute of limitations for declined *qui tam* complaints. To do so would only frustrate an important Government interest of recovering ill-gotten taxpayers' funds.

1. The Statute of Limitations would not be Longer for Relators, as Petitioners Incorrectly Suggest

Petitioners conjure up a second potentially absurd result by suggesting that the limitation period would be longer for relators than for the Government. Petitioner Brief at 26-27. Petitioners argue that under the Eleventh Circuit approach, the limitations period is never triggered for a relator, but only applies to the Government. *Id.* Petitioners are mistaken. The ten-year provision is always exactly the same regardless of whether the case is initiated by relators or the Government. It extends to ten years only if a FCA complaint is filed (either by the Government or relators) within three years of when the named Government officials charged with authority to act have knowledge of the fraud allegations. The date of knowledge of such Government officials is the key and does not fluctuate depending upon whether relators file a *qui tam* complaint or the FCA case is initiated by the Government. The statute is clear; for the ten-year provision to apply a FCA suit must be initiated within three years of when the named Government

officials charged with authority to act have knowledge. If the relator files suit four years after the named Government officials have knowledge of the fraud, the ten-year provision does not apply. Thus, the relator does not enjoy a longer period than the Government.

Nor would it cause headaches or difficult discovery to determine the date of such Government knowledge (Petitioners Brief at 32), because, as shown below, such knowledge is limited to the Attorney General and his delegates, i.e. Assistant United States Attorneys, who have authority to address FCA allegations. It is easy to know exactly when the FCA allegations was received by such named Government officials because they formally open a file whenever they receive FCA allegations. It would be a simple matter of the Government officials with authority to act, which are the very Government attorneys appearing in the FCA case, to inform the parties and the court the date on which they received the FCA allegations.

II. AN "OFFICIAL OF THE UNITED STATES CHARGED WITH RESPONSIBILITY TO ACT" DOES NOT INCLUDE A RELATOR

The second issue before this Court is whether the relator constitutes an "official of the United States charged with responsibility to act." The plain text of the FCA forecloses any such readings. Under the FCA, the statute of limitations is ten years provided that a FCA complaint is filed either by a relator or the Government within three years of when Government officials with actual authority to

compromise FCA cases have knowledge of the fraud. The FCA defines the duration of the statute of limitations as

> more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the **official of the United States charged with responsibility to act** in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

31 U.S.C. § 3731(b)(2) (emphasis added).

It is clear on its face that Congress intended the three-year knowledge period to apply only to Government officials possessing actual authority to act, which cannot be a relator (or any other person other than the named officials). As articulated in a law review article by Professor Hesch, the named Government officials under this provision means the Attorney General and his delegates:

> With respect to identifying the appropriate government officials with knowledge, Congres s provided the answer. First, it appointed the Attorney General as the only government official with authority to compromise an FCA case or common-law fraud claim. [17] The

[17] "The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. See [31 U.S.C.] § 3730 (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see

> Attorney General delegated authority to certain attorneys in the DOJ offices in Washington, D.C, and in cases with certain dollar thresholds to the USAO nationwide. [18] Second, under the FCA, Congress included a three-year tolling provision of the statute of limitations that applies until the 'facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances . . . .'

Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 (2012).

In short, Congress had a very specific meaning when it used the phrase "official of the United States charged with responsibility to act." Indeed, "[b]y law, the Attorney General is the only Government official

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also [31 U.S.C.] § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division)." Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 fn. 281 (2012).

[18] "28 C.F.R. § 0.45(d) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division); 28 C.F.R. Pt. 0, Subpt. Y, App. (assigning FCA cases where damages will not exceed $1,000,000 to the USAO)." *Id.* at 265 fn. 282.

with authority to settle an FCA case." Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901, 918 (2015) (citations omitted). "However, the Attorney General delegated authority to certain attorneys in DOJ offices in Washington, D.C.; these offices are the Civil Division, Commercial Litigation Branch, Fraud Division (DOJ Civil Frauds), and in cases under certain dollar thresholds, to USAOs nationwide." *Id.* Thus, the Government officials spoken of within the FCA's statute of limitations is limited to knowledge of the Government attorneys responsible for litigating FCA cases, i.e. Assistant United States Attorneys and the attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C. They are the only Government officials with authority established by Congress to act upon FCA cases. Thus, it is clear that the persons with knowledge spoken of in the FCA's statute of limitations cannot include knowledge of the relator (or for that matter, any other Government employee). Rather, the relator's knowledge only becomes relevant when she turns that information over to the Government officials charged with authority to act, such as by filing a *qui tam* case.

It would be absurd to consider employees of the wrongdoing company a Government official with authority to act. First, Congress limited the knowledge to a few very specific Government officials possessing actual authority to compromise FCA allegations, and did not intend this provision to include any and all Government employees with knowledge, let alone employees of the wrongdoer who

ultimately file a *qui tam* complaint. Second, the Government is the real party in interest in a *qui tam* suit, not the relator. *Eisenstein*, 556 U.S. at 930. Third, as discussed earlier, the FCA includes many other restrictions that bar relators from proceeding, including the first to file bar, the public disclosure bar, and the Government action bar. Indeed, these same Government officials with authority to act identified within the statute of limitations provision are the same Government officials Congress granted ultimate authority over *qui tam* complaints, including the power to dismiss, settle, or limit participation of the relator.[19]

In short, Congress did not want the three-year knowledge standard within this provision to run when any Government employee had some knowledge of the fraud. Nor did it want it to include when employees of the wrongdoing entity became aware of the fraud. Rather, Congress adopted a ten-year statute of limitations provided that a FCA complaint is filed either by a relator or the Government within three years of when named Government officials with actual authority to act have knowledge of the fraud. Accordingly, a relator does not constitute "the official of the United States charged with responsibility to act."

CONCLUSION

For the reasons stated above, the judgment of the Eleventh Circuit should be affirmed.

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[19] *See supra* notes 8-10 and surrounding text.

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No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
BILLY JOE HUNT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INDIANA AND 19 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of 3731(b)(2).

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Michigan, Minnesota, New Jersey, North Carolina, Oklahoma, Pennsylvania, Utah, Virginia, Washington, and Wisconsin respectfully submit this brief as *amici curiae* in support of the respondent.

The *Amici* States have a strong fiscal interest in ensuring the False Claims Act (FCA) provides adequate time to investigate, prepare, and file FCA claims. When the federal government uses the FCA to recover money defrauded from Medicaid, a State receives a share in direct proportion to the State's share of Medicaid costs—or, if the State has passed a false claims act that complies with federal standards, this proportion plus ten percentage points. *See* 42 U.S.C. § 1396h. States, therefore, have a significant stake in FCA cases, which often involve considerable sums: In 2018 the federal government recovered $2.8 billion in FCA settlements and judgments, the vast majority of which involved Medicare and Medicaid programs. *See* Department of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

The *Amici* States also have an interest in the proper interpretation of the FCA because the Court's decision likely will influence how lower courts interpret States' own false claims acts. Partially because of

§ 1396h's incentive to adopt state-level FCA analogues, at least 30 States and the District of Columbia have adopted laws similar to the FCA. *See* Appendix. Many FCA Medicaid cases raise parallel claims under both federal and state false claims acts, and the Court's decision here likely will influence how the federal courts hearing these cases interpret similar state laws.

The interpretation petitioners urge the Court to adopt would frequently force many States to expend scarce resources to litigate false-claims cases themselves and would limit opportunities for States to discover, deter, and remedy fraud in their Medicaid programs. The *Amici* States therefore submit this brief in support of respondent and in opposition to petitioners' non-textual—and paradoxical—interpretation of the FCA.

SUMMARY OF THE ARGUMENT

The False Claims Act (FCA) imposes strict sanctions for knowingly submitting false claims for payment to the federal government. And like dozens of analogous state laws, *see* Appendix, the FCA authorizes enforcement both by the government itself, 31 U.S.C. § 3730(a), and by private persons (known as relators) who sue "in the name of" the United States, *id.* § 3730(b). A relator initiates a suit by filing a complaint under seal and serving the complaint on the United States, which then decides whether to intervene. *Id.* § 3730(b)(2).

This case turns on the interpretation of the 1986 amendments to 31 U.S.C. § 3731(b), what was then the FCA's sole statute-of-limitations provision: 3731(b) requires that "[a] civil action under section 3730" be brought within the latter of 6 years after the relevant FCA violation, *id.* § 3731(b)(1), or 3 years after the facts underlying the violation "are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances" if the action is brought within 10 years after the violation, *id.* § 3731(b)(2).[1]

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[1] Before Congress added 3731(b)(2)'s three-years-after-discovery limitations period in 1986, 3731(b)'s six-years-after-violation limitations period was the FCA's only statute of limitations. *See* Pub.L. 99-562. In 2010, in response to *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), which held that 3731(b) does not apply to retaliation

Under 3731(b)'s plain meaning, an FCA action is timely if it is brought within the latter of six years after the FCA violation or three years after "the official of the United States charged with responsibility to act in the circumstances"—that is, a federal government official—knew or reasonably should have known the facts underlying the action. The government's and relators' actions are authorized by subsections 3730(a) and 3730(b), respectively, and they are therefore "civil action[s] under section 3730" to which both of 3731(b)'s limitations periods apply. Each of 3731(b)'s limitations periods—3731(b)(1)'s six-years-after-violation period and 3731(b)(2)'s three-years-after-discovery period—apply to actions brought by the government *and* actions brought by relators.

Petitioners contend, however, that *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), which held that 3731(b) does not apply to FCA retaliation actions, requires the Court to interpret 3731(b) to "avoid[] counterintuitive results." Pet'r Br. 17. *Graham* requires ignoring 3731(b)(2)'s plain meaning here, so the argument goes, because applying 3731(b)(2)'s limitations period to a relator's action when the government does not intervene is "absurd[]," *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006); Pet'r Br. 29, and "bizarre," *U.S. ex*

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claims brought under 31 U.S.C. § 3730(h), Congress added a second statute-of-limitations provision that explicitly applies only to retaliation claims. *See* 31 U.S.C. § 3730(h)(3); Pub. L. 111-203, Title X, § 1079A(c).

rel. Sanders v. N. Am. Bus Indus., Inc., 546 F.3d 288, 293 (4th Cir. 2008).

In particular, petitioners claim that 3731(b)(2)'s plain meaning would burden government agencies with discovery requests and would hinder government efforts to quickly detect and punish fraud. Pet'r Br. 28–35. Yet, while industry groups have filed amicus briefs in support of petitioners, no governmental entity has appeared on petitioners' behalf to echo these concerns. For good reason: The policy concerns that worry petitioners are exaggerated and misplaced. *See infra*, Part I.B.

Petitioners offer two ways of reinterpreting 3731(b), but both are non-textual and internally contradictory. The Court should reject their attempt to amend the FCA by judicial fiat. Section 3731(b) adopts a perfectly sensible policy. It should be enforced as written.

I. Petitioners first argue that 3731(b)(2)'s limitations period does not apply to an action brought by a relator under 3730(b) if the government does not later intervene—though they concede that 3731(b)(1)'s limitations period *does* apply to such an action even when the government does not intervene. Pet'r Br. 20 n.3. Petitioners argue, in other words, that an action brought by a relator under 3730(b) sometimes *is* "[a] civil action under section 3730" and sometimes *is not*, depending on whether the government later intervenes and depending on whether the relator is seeking to use the limitations period in 3731(b)(1) or the

limitations period in 3731(b)(2). Petitioners' failure to give the phrase "[a] civil action under section 3730" a consistent meaning—much less a meaning reconcilable with the statutory text—dooms this theory. Neither petitioners' unsubstantiated policy concerns nor *Graham* justifies discarding the FCA's text.

II. Petitioners' backup theory fares no better. They argue in the alternative that 3731(b)(2)'s phrase "official of the United States charged with responsibility to act in the circumstances" should be interpreted to refer to the relator—but only when the government does *not* intervene (petitioners acknowledge that when the government *does* intervene the phrase refers only to the government). Petitioners' alternative theory, like their first, thus contradicts itself: It gives the same statutory phrase entirely different meanings depending upon a case's circumstances. Congress could have adopted petitioners' rule, but it did not do so. The Court should not do so either.

ARGUMENT

I. The FCA's Statute of Limitations, 31 U.S.C. § 3731(b), Applies to All Actions Under §§ 3730(a) and (b)

A. An action brought by a relator under § 3730(b) plainly is a "civil action under section 3730"

1. "The preeminent canon of statutory interpretation requires [the Court] to 'presume that the legislature says in a statute what it means and means in a

statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal brackets omitted) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992)). For that reason, "[s]tatutory interpretation, as [the Court] always say[s], begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). And the statutory text "is also where the inquiry should end . . . where, as here, the statute's language is plain," for in that circumstance "'the sole function of the courts is to enforce [the statute] according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Section 3731(b)'s language is indeed plain: Its first six words—"[a] civil action under section 3730"—are the *only* words identifying to which actions it applies. 31 U.S.C. § 3731(b). The provision's remaining portions, 3731(b)(1) and (b)(2), merely set out two alternative limitations periods. An action to which 3731(b) applies may be brought within either of these limitations periods, "whichever occurs last." *Id.* And because an action brought by a relator under 3730(b) obviously is "[a] civil action under section 3730," both of these limitations periods apply to relators' FCA actions. *Id.*

If Congress wished to narrow the scope of the FCA's statute of limitations it knew how to do so. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005). Other provisions of the FCA specifically refer to actions in which the government intervenes.

Subsections 3730(g) and 3731(c) specifically refer to intervened cases: Fees and expenses are awarded to the prevailing defendant "[i]n civil actions brought under this section *by the United States*," 31 U.S.C. § 3730(g) (emphasis added), and the government may file its own complaint or may amend the relator's complaint "[i]f the Government elects to intervene and proceed with an *action brought under 3730(b)*," *id.* § 3731(c) (emphasis added). Elsewhere, the FCA specifically distinguishes between actions brought by the government and actions brought by relators. *See id.* § 3733(a)(1) (providing that the government may serve a civil investigative demand "before commencing a civil proceeding *under section 3730(a)* or other false claims law, or making an election *under section 3730(b)*") (emphasis added).

Because there is no suggestion anywhere in the FCA that "[a] civil action under section 3730" means anything other than precisely what it says, the Court's inquiry should end there.

Petitioners, however, ask the Court to insert a qualifying clause to "[a] civil action under section 3730" so that it means "a civil action under section 3730 *where the government is a party*." *See* Pet'r Br 19–20 ("[T]o refer only to suits filed by the United States or in which the United States has intervened . . . Congress used the . . . language—'[a] civil action under section 3730'"); *id.* at 39 ("When the phrase "[a] civil action under Section 3730" is read in context . . . it becomes apparent that Section 3731(b)(2) . . . is "limited to § 3730(a) actions brought by the United

States and § 3730(b) actions in which the United States intervenes as a party." (internal quotation marks and citation omitted); *id.* at 10–11 (similar).[2] The Court should refuse petitioners' invitation to amend 3731(b). "[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005)).

2. Beyond its lack of any connection to the statutory text, the chief difficulty with petitioners' theory is its internal incoherence. Petitioners suggest that the phrase "[a] civil action under section 3730" refers only to actions in which the government is a party, but everyone—including petitioners—agrees that, when it comes to 3731(b)(1)'s six-years-after-violation limitations period, "[a] civil action under section 3730" encompasses *all* actions brought under 3730(a) and (b), regardless whether the government eventually intervenes. *See* Pet. 20 n.3; *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545

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[2] Petitioners also note that 3731(b)(2) "refers only to an 'official of the United States,'" but they do not appear to claim that this reference *itself* means that 3731(b)(2)'s limitations period applies only to actions where the government is a party. Pet'r Br. 10 (quoting 31 U.S.C. § 3731(b)(2)). Indeed, 3731(b)(2)'s reference to an "official of the United States" identifies *whose knowledge* begins the limitations period and does not identify *to which actions* the limitations period applies. The only language in 3731(b) identifying to which actions the limitations periods in 3731(b)(1) and (b)(2) apply is "[a] civil action under section 3730," and it is therefore *this* language that requires parsing here.

U.S. 409, 416 (2005) ("Section 3731(b)(1), by contrast, naturally applies to well-pleaded §§ 3730(a) and (b) actions."); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006); *U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). Under petitioners' theory, in other words, the phrase "civil action under section 3730" simultaneously has two different meanings: With respect to 3731(b)(1)'s limitations period, it has one meaning—any action brought under 3730(a) or (b). But with respect to 3731(b)(2)'s limitations period it has an entirely different meaning—any action brought under section 3730(a) or (b) *where the government is a party*.

Petitioners cannot have it both ways. The Court generally construes similar language appearing in *different* places "the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). It has "even stronger cause to construe *a single formulation* . . . the same way each time it is called into play." *Id.* (emphasis added); *see also Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning . . . would be to invent a statute rather than interpret one. . . . [A single phrase] cannot . . . be interpreted to do both [things] at the same time."); *Stokeling v. United States*, 139 S. Ct. 544, 560 (2019) (Sotomayor, J., dissenting) (rejecting the idea that the same phrase "in a single clause . . . might mean two different things for two different crimes. . . . [T]hat is not how we have said that statutory interpretation works."). The Court should refuse, as it has many times before, "to adopt a construction

that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) (citing *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983)).

Petitioners' theory turns the phrase "[a] civil action under section 3730" into Schrödinger's cat, simultaneously giving it two mutually exclusive meanings. Such a paradox may be acceptable in quantum physics, but it has no place in statutory interpretation.

3. Petitioners seek to support this paradoxical interpretation by invoking a handful of interpretive canons, but none actually provide the support petitioners seek.

Petitioners first rely upon the traditional presumption that "identical words used in different parts of the same act are intended to have the same meaning," Pet'r Br. 20 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018)), but petitioners' application of this rule is mistaken. They assert that subsection 3731(d)—which provides that "*[i]n any action brought under section 3730*, the United States shall be required to prove all essential elements . . . by a preponderance of the evidence," 31 U.S.C. § 3731(d) (emphasis added)—applies only to suits in which the United States is a party, and they contend that the similar language in 3731(b) should be interpreted similarly.

But this argument's initial premise—that 3731(d) applies only to cases in which the government is a

party—is mistaken. That provision is most reasonably read to apply to *all* actions brought under 3730(a) and (b): It is much more consistent with 3731(d)'s text to read "the United States" to refer to the government *and* the relator—who, after all, acts "in the name of the United States," 31 U.S.C. § 3730(b)—than it is to read "*any* action brought under section 3730," *id.* § 3731(d) (emphasis added), to mean *only* those actions brought by the government or in which the government intervenes. *See U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 714 (7th Cir. 2014) (applying 3731(d) to a relator's suits even though the government did not intervene); *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003) (same); *U.S. ex rel. Feldman v. van Gorp*, No. 03 CIV. 8135 (WHP), 2010 WL 2911606, at *4 (S.D.N.Y. Dec. 9, 2010) (same). Petitioners' reading of 3731(d) implies that a *different* standard of proof would apply to a relator's suit when the government does not intervene, a counterintuitive conclusion no court has reached.

Petitioners justify their interpretation of 3731(d) solely on the basis of dicta from *Graham*, where the Court suggested that the phrase "any action brought under section 3730" in 3731(d)—then 3731(c)—"refer[s] only to §§ 3730(a) and (b) actions." 545 U.S. at 418. But that suggestion arose in a case involving an entirely different provision and was made in reliance on concessions made by the relator and the United States. *Id.* ("As Wilson and the United States concede, the context of [3731(d)] implies that the phrase 'any action brought under section 3730' is limited to . . .

§ 3730 actions in which the United States necessarily participates."). And the only reason the Court gave for reading 3731(d) that way was that any other interpretation would require "the United States . . . to prove all essential elements of the cause of action . . . regardless of whether it participated in the action." *Id.* (internal quotation marks omitted). This ignores, however, that "the United States" in 3731(d) can reasonably be read to refer to the government *and* the relator, such that relators must, like the federal government itself, prove their claims by a preponderance of the evidence.[3]

Furthermore, petitioners' argument fails even accepting their interpretation of 3731(d). It is sensible to interpret similar language similarly only when the provisions allegedly similar to the text at issue have a consistent meaning. Here they do not. Other provisions of the FCA use the "action under section 3730 language" to refer to *all* actions brought under

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[3] That *3731(d)*'s term "the United States" encompasses any entity bringing suit in the name of the United States does not imply that *3731(b)(2)*'s phrase "the official of the United States charged with responsibility to act in the circumstances" refers to both the federal government and relators. Section 3731(d) simply refers to "the United States" generally, while 3731(b)(2) refers to the specific "official of the United States charged with responsibility to act in the circumstances." In addition, "the United States" can consistently be interpreted to mean "party representing the interests of the United States." But "the official of the United States charged with responsibility to act in the circumstances" cannot consistently be interpreted to refer to relators: Not even petitioners claim that a relator's knowledge triggers 3731(b)(2)'s limitations period in actions where the government *does* intervene. *See infra*, Part II.

3730(a) and (b), including actions to which the government is not a party. *See* 31 U.S.C. § 3731(a) (authorizing a "subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730"); *id.* § 3732(a) (conferring jurisdiction on district courts over "[a]ny action under section 3730"); *id.* § 3732(b) (conferring jurisdiction on district courts over state law claims related to "the same transaction or occurrence as an action brought under section 3730").

Indeed, petitioners acknowledge that, when it comes to 3731(b)(1)'s six-years-after-violation limitations period, "[a] civil action under section 3730" *in 3731(b) itself* refers to *all* actions brought under 3730(a) and (b). Pet. 20 n.3. Petitioners fail to give a consistent meaning to 3731(b), much less a consistent meaning to all of the other references to a "civil action under section 3730" in the FCA. Their invocation of the similar-language rule founders on this inconsistency.

Petitioners next look to the presumption against superfluities, but their reliance on this rule is equally unfounded. They observe that under the plain-meaning interpretation of 3731(b), an FCA plaintiff would use 3731(b)(1)'s limitations period only "when the government learn[s] about the fraud within the first three years of its occurrence," and they assert that the government will so rarely discover frauds this quickly that this interpretation makes 3731(b)(1) practically superfluous. Pet'r Br. 27–28. But petitioners simply *assume* that the government will take more than

three years to discover frauds. Neither they nor their supporting amici have adduced any evidence to support this proposition. *See* Pet'r Br. 28; Chamber of Commerce Br. 11–12.

Moreover, even granting petitioners' assumption, the presumption against superfluities does not apply to an interpretation that makes two statutory provisions each "applicable in some situations": It is sufficient that one provision does "not subsume the [other]," and that each "provision[] retain[s] significant independent meaning." *Quality King Distrib., Inc. v. L'anza Research Intern., Inc.*, 523 U.S. 135, 149 (1998). Statutory language, in other words, "is not rendered superfluous merely because in some contexts that language may not be pertinent." *United States v. Turkette*, 452 U.S. 576, 583 n.5 (1981). Even if relators often rely on 3731(b)(2)'s three-years-after-discovery limitations period, they will sometimes use 3731(b)(1)'s six-years-after-violation limitations period (i.e., when the government discovers the fraud within three years of the violation). That is enough to render the presumption against superfluities inapplicable here.

Petitioners' third textual argument—that Congress largely copied the "known by the official of the United States charged with responsibility to act in the circumstances" language in 3731(b)(2) from 28 U.S.C. § 2416(c), which tolls the generally applicable limitations periods for most civil claims brought by the federal government, Pet'r Br. 20–21—is irrelevant. As the Eleventh Circuit explained below, "[t]he duplicate

language in § 2416 is not what specifies that [it] . . . applies only when the United States is a party." Pet. App. 27a–28a. Rather, 2416(c) provides that its tolling provision applies only to the statutes of limitations listed in 28 U.S.C. § 2415. And *that* provision requires the United States to be a party for its statutes of limitations to apply. *See id.* § 2415(a), (b). Because "[t]here is no similar language in any FCA provision expressly restricting § 3731(b)(2)'s limitations period to actions where the United States is a party," "borrowing the description of the trigger for the limitations period from § 2416" does not evince congressional intent to require the United States to "be a party for the limitations period in § 3731(b)(2) to apply." Pet. App. 28a.

4. Finally, left with a theory that cannot be squared with text, logic, or the traditional rules of statutory interpretation, petitioners claim that *Graham* announced an "interpretive approach to Section 3731(b)(2)" that incorporates "due regard for avoiding counterintuitive results." Pet'r Br. 17. Like the Fourth and Tenth Circuits, they argue that, under this approach, policy considerations require disregarding 3731(b)'s literal text. *See* Pet'r Br. 26–35 (arguing that the "counterintuitive results" of reading 3731(b) literally "call into question whether Section 3731(b)(2) should be given the literalistic interpretation adopted by the Eleventh Circuit"); *U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293–95 (4th Cir. 2008) (rejecting literal reading of 3731(b) because "[i]t would be problematic" and would "gener-

ate[] numerous practical difficulties"); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006) (concluding that a literal reading of 3731(b) "would run afoul of the absurdity doctrine").

The Court should reject petitioners' invitation to engage in judicial policymaking-by-interpretation. If anything, *Graham* weighs in favor of *ignoring* the policy arguments petitioners advance. *Graham* addressed whether 3731(b) applied to retaliation actions under 3730(h), and, like this case, the answer turned on the interpretation of "[a] civil action under section 3730." *See Graham*, 545 U.S. at 415–16. But the similarities between the two cases end there.

Critically, *Graham* held that it was "*ambiguous* whether a § 3730(h) retaliation action is 'a civil action under section 3730.'" *Id.* at 515 (emphasis added); *see also id.* at 416 ("[It is] ambiguous about whether 'action under section 3730' means all actions under § 3730, or only §§ 3730(a) and (b) actions."). The ambiguity was evident because *both* proposed interpretations required adding new language to the statute: The relator's interpretation proposed reading the statute "as if it said 'the [suspected or actual] violation of section 3729,'" and the defendant's interpretation proposed reading it "as if it said 'civil action under section 3730[(a) or (b)].'" *Id.* at 417 (brackets in original).

Here, however, only petitioners' theory requires the Court to interpolate additional text into the statute. Petitioners ask the Court to read 3731(b) as if it

said that a "civil action under section 3730 [where the government is a party] may not be brought . . . ." Pet'r Br. 10–11, 19–20, 39. And even with this interpolation petitioners' interpretation of the statutory phrase is internally contradictory, for they—unlike the defendants in *Graham*—contend that 3731(b)(1) applies to a different set of actions than 3731(b)(2). *See* Pet'r Br. 20 n.3; *Graham*, 545 U.S. at 415 (holding that *neither* of the limitations periods in 3731(b)(1) and (b)(2) apply to retaliation actions because "[t]he only arguably applicable express statute of limitations is the 6–year limit set forth in § 3731(b)(1)"); *U.S. ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 367 F.3d 245, 248 n.1 (4th Cir. 2004), *rev'd and remanded*, 545 U.S. 409 (2005) (limiting analysis to 3731(b)(1) because "neither party advance[d] . . . [3731(b)(2)] as controlling").

On the other hand, the alternative, literal reading of 3731(b) is both coherent and enforceable: Any action brought under 3730(a) or (b) is timely if it is brought within the latter of six years after the FCA violation or—if it is brought within ten years after the violation—three years after the relevant federal official knew or should have known the relevant facts. Petitioners acknowledge that this rule applies to relators' suits when the government intervenes, and it does not suddenly become impossible to apply this rule to relators' suits if the government does *not* intervene. They concede as much, for they allege that the literal reading of 3731(b) merely would produce "counterintuitive results." Pet'r Br. 35.

But while "counterintuitive results" may be considered to *resolve* statutory ambiguity, they do not *create* statutory ambiguity themselves. Indeed, *Graham* makes this point directly. After establishing the statutory ambiguity by reference to the two necessary interpolations, the Court noted that applying 3731(b)(1)'s limitations period to retaliation claims would be inconsistent with "the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues," 545 U.S. at 418, and would "allow[] a retaliation action to be time barred before it ever accrues," *id.* at 421. Interpreting 3731(b) not to apply to retaliation actions "avoids these counterintuitive results." *Id.* The Court cautioned, however, that it "is not the proper analysis" to invert this order of operations and find ambiguity on the ground that "it is so unlikely that a legislature would actually intend to start the statute of limitations running before the cause of action accrues." *Id.* at 419 n.2 (citation and internal quotation marks omitted). Rather, 3731(b)(1) was "ambiguous because its text, literally read, admits of two plausible interpretations." *Id.* The Court "appl[ied] the rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues to resolve that ambiguity, *not to create it in the first instance*." *Id.* (emphasis added).

B. In the *Amici* States' view, § 3731(b)'s plain meaning reflects a sensible policy choice that advances the fundamental goals of the False Claims Act and its state analogues

1. Because the meager textual arguments petitioners marshal in support of their paradoxical interpretation of 3731(b) fail to introduce any ambiguity to the provision, its meaning remains plain. And as the Court has "reiterate[d]" many times, "'when a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (internal brackets omitted) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The Court's analysis therefore can properly stop here.

But even if the Court were to accept petitioners' invitation to consider 3731(b)'s practical consequences, the fact remains that there is nothing unreasonable about declining to vary the statute of limitations for relators' actions depending on whether the government eventually intervenes. It certainly "is not such an absurd [policy] as to require departure from the words of the Act." *Cloer*, 569 U.S. at 381.

Perhaps the clearest indication that "Congress knew exactly what it was doing," *Stewart v. Abend*, 495 U.S. 207, 245 n.7 (1990) (Stevens, J., dissenting), is that multiple States have adopted—with language

even more explicit than the federal FCA—precisely the rule that petitioners claim is "absurd," Pet'r Br. 29. Texas's Medicaid Fraud Prevention Act, for example, originally had no specific statute of limitations, which raised the question whether the State's residual four-years-from-accrual limitations period applied to relators' actions or whether a relator's action was a "right of action of this state" to which the residual statute of limitations did not apply. *U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 817 (E.D. Tex. 2008) (citing Tex. Civ. Prac. & Rem. Code §§ 16.051, .061). At least one federal district court held that Texas's residual statute of limitations did apply to relators' actions, *see id.* at 818, and five years later Texas amended its Medicaid Fraud Prevention Act to create the rule petitioners disparage—namely, to provide that, where "the state declines to take over the action," "the person bringing the action" may recover "for a period beginning when the unlawful act occurred until up to three years from the date the state knows or reasonably should have known facts material to the unlawful act." Acts of 2013, 83d Leg., ch. 572 (S.B. 746) (codified at Tex. Hum. Res. Code § 36.104(b)).

Not only has Texas consciously chosen to permit relators in non-intervened suits to bring actions within three years of the government's knowledge, but several other States also have similar provisions that set out the same two limitations periods and that specifically apply both periods to actions brought by the government *and* actions brought by relators. *See*

Appendix (Alaska, Colorado, Connecticut, Massachusetts, Montana, and Virginia). Of the remaining States with false claims acts, most use language mirroring the federal FCA, one applies the State's general four-year statute of limitations, one provides a ten-years-after-violation limitations period, and one provides that actions can be brought at any time. *See generally id.* Notably, *no State* has a statute of limitations that explicitly adopts the rule reflected in petitioners' tortured interpretation of the federal FCA. It is petitioners' proposed rule—not the FCA's plain meaning—that is absurd.

There are good reasons why Congress adopted 3731(b)'s language rather than the amendment petitioners propose. As petitioners and their supporting *amici* acknowledge, the extensive time it takes to prepare FCA suits makes it reasonable to give the government three years to bring suit after discovering a false claim. *See, e.g.*, Pet'r Br. 35–37 (discussing concerns that motivated the addition of 3731(b)(2), including the worry that the government would not have enough time to detect and bring suits against false claimants); Chamber of Commerce Br. 9–10 (same). And once Congress made this choice, concerns of administration made it reasonable to apply 3731(b)(2)'s three-years-after-discovery limitations period to *all* non-retaliation FCA actions, whether or not the government is a party.

For example, applying 3731(b)(2)'s limitations period to all FCA actions allows the government to consider whether to intervene without worrying that not

intervening will result in dismissal of an action on statute-of-limitations grounds. There are many reasons the government may decline to intervene in a relator's action that have nothing to do with its merits, such as a lack of resources or different enforcement priorities. *See* Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A)*, at 1 (Jan. 10, 2018), https://tinyurl.com/ycdd7tzr ("[A] decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources."), *cited in* Coalition for Government Procurement Br. 9; *see also* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1749–50 (2013) ("Simply put, forces other than case merit contribute to DOJ intervention decisions."). And under 3731(b)'s plain meaning, the government can weigh these considerations secure in the knowledge that if it declines to intervene the relator will be permitted to vindicate the government's interests standing in the same position the government would have been in if it had intervened.

Petitioners' theory, meanwhile, frequently would put the government to the difficult choice of either expending scarce resources to intervene in a relator's suit—and thereby make 3731(b)(2)'s limitations period applicable—or force the relator's suit to be dismissed as untimely. Because the government currently intervenes in a small minority of cases, this

could force the government to prosecute significantly more FCA actions itself. *See* Coalition for Government Procurement Br. 9 ("The Government elects to intervene in relators' FCA suits only about 20 percent of the time."). And forcing the government to do so defeats the very purpose of the amendments that added 3731(b)(2) to the FCA, which was "to encourage more private enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23–24 (1986). In sum, petitioners' interpretation of 3731(b) "would only force the government to unnecessarily intervene in *qui tam* cases and thereby frustrate the efficacy of the *qui tam* framework," for "there is 'little purpose' to *qui tam* framework if government is forced to pursue all meritorious claims." *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 343 n.6 (6th Cir. 2000) (quoting *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir.1997)).

In addition to creating a uniform rule for all non-retaliation FCA actions, 3731(b)'s plain meaning also ensures that relators know, at the time they file their complaints, the statute of limitations that will apply to their action. An FCA action, like all other actions "created by federal law," is commenced for statute-of-limitations purposes by "filing a complaint." *Henderson v. United States*, 517 U.S. 654, 657 n.2 (1996); *see also* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 396 (D. Mass. 2007) (collecting authorities). For this reason, it is essential that a relator know, at the

moment his complaint is filed, which limitations period applies to his action; otherwise, he will not know the applicable deadline for filing the complaint. Under 3731(b)'s plain meaning, the relator will know: He will need to file the complaint either within six years of the FCA violation or within three years from when the government knew or should have known the relevant facts—but in no event more than ten years after the violation.

Under petitioners' theory, however, a relator will not know whether 3731(b)(2)'s limitations period applies until after the government has decided to intervene—which of course occurs after the relator has filed his complaint. In fact, the relator will not know definitively even when the government makes its initial intervention decision, because the government may initially decline to intervene but may "nevertheless . . . intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3). Legal proceedings and settlement negotiations could continue for years without any of the interested parties knowing something as fundamental as the applicable statute of limitations. *See, e.g., United States ex rel. Robinson v. Indiana Univ. Health Inc.*, 2016 WL 10567964, at *14 (S.D. Ind. Mar. 30, 2016) (declining to determine the applicable limitations period because the government had "reserved the right to intervene when its investigation is complete"). When it enacted 3731(b) Congress prudently chose to prevent this outcome.

2. Even if the Court were to look past the interpretive irrelevance of petitioners' policy concerns—and

look past petitioners' failure to address the rationales supporting a uniform statute of limitations—the policy arguments petitioners raise remain unsubstantial and unsupported.

Petitioners first note that lower courts have not identified other statutes of limitations that turn on the knowledge of someone who is not "an *actual* party to the case," Pet'r Br. 26, but the absence of doctrinal parallels is unremarkable. The Court has observed that the FCA is one of only four extant *qui tam* statutes. *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000). And the government's status as a "non-party" in *qui tam* suits is unique. Unlike most non-parties, the government is "a 'real party in interest' in an FCA action" and has a "right to a share of any resulting damages." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009). And unlike any other non-party, the United States has a considerable degree of authority to act in FCA cases even when it has not intervened: It may later intervene at any time upon a showing of good cause, 31 U.S.C. § 3730(c)(3), may seek a stay of discovery, *id.* § 3730(c)(4), may unilaterally reject a settlement, *id.* § 3730(b)(1); *U.S. ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017), and may dismiss or settle the case, *id.* § 3730(c)(2)(A)–(B); *U.S. ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1233 (D.C. Cir. 2012). Given the government's central role in FCA actions, even where it is not formally a party, it is unsurprising that Congress chose to make the government's knowledge trigger one of the FCA's limitations periods.

Indeed, as noted above, it is *petitioners'* theory that inverts traditional rules. Under petitioners' interpretation of 3731(b), an action brought by a relator may or may not be a "civil action under section 3730"—and thus may or may not be timely—depending on what the government does *after* the complaint is already filed. This inverts the ordinary rule that the timeliness of a complaint is determined the day it is filed, *see Henderson*, 517 U.S. at 657 n.2, and instead makes the timeliness turn on a decision a (then) non-party makes some time after the complaint is filed.

Petitioners and their supporting *amici* also claim that the plain-meaning interpretation of 3731(b) will give relators an incentive to delay filing their complaints, but this claim is based on nothing more than speculation. Neither the briefing before this Court nor the decisions with which the Eleventh Circuit departed contained evidence that this is the case. And there are strong reasons to doubt that it is: A relator who delays bringing an action to incur additional damages risks receiving no damages at all, for the action will be barred if the government or another private party files suit first, 31 U.S.C. § 3730(b)(5), (e)(3), or if the underlying facts are publicly disclosed while the would-be relator waits, *id.* § 3730(e)(4). In addition, relators, like other plaintiffs, typically seek to obtain recovery sooner rather than later; especially in light of the frequently lengthy time between initiation and termination of FCA cases, *see* Washington Legal Foundation Br. 9–10, it is unlikely that relators will intentionally seek to delay the moment when they will finally receive a reward for their efforts.

Finally, petitioners suggest that the plain-meaning interpretation of 3731(b) will impose intrusive discovery on the government, but this ignores two important facts. First, because the government invariably holds important information related to the merits of the case, it almost always will be involved in discovery regardless of the statute-of-limitations rule. As one of petitioners' supporting *amici* points out, "the fact-intensive nature of FCA claims ordinarily requires extensive discovery from the relevant agencies." DRI Amicus Br. 13 (citing David S. Torborg, *The Dark Side of the Boom: The Peculiar Dilemma of Government Spoliation in Modern False Claims Act Litigation*, 26 J. L. & Health 181, 184, 187–90 (2013)); *see also id.* at 16; Granston, *supra*, at 1. Because the government will be subject to discovery in any event, it makes little sense to depart from 3731(b)'s plain meaning in order to avoid imposing a discovery burden on the government.

Second, if the government thinks the potential recovery from a relator's FCA action is not worth the costs of discovery, it can move to stay discovery, 31 U.S.C. § 3730(c)(4), or dismiss or settle the case entirely, *id.* § 3730(c)(2)(A)–(B). The United States recognizes these trade-offs and has already instituted internal policies instructing government attorneys to consider using these statutory tools "when the government's expected costs are likely to exceed any expected gain." Granston, *supra*, at 6–7 (noting that examples of costs include "responding to discovery requests"). And state governments are equally capable of weighing these considerations. *See, e.g.*, Order on

Mot. to Dismiss, *U.S. and Indiana ex rel. Misch v. Mem'l Hosp. of South Bend, Inc.*, Case No. 3:16-cv-587 (N.D. Ind.) (granting State of Indiana's motion to dismiss pursuant to Indiana Code § 5-11-5.7-5(b), which authorizes the Indiana Attorney General to move to dismiss Indiana false claims act claims asserted on behalf of the State).

Even if petitioners' policy considerations were relevant, there is no reason to think that abiding by 3731(b)'s plain meaning will either delay the government's recovery from FCA violations or impose significant discovery costs. Virtually all the policy concerns to which petitioners point involve governmental interests. Yet no governmental entity has joined petitioners' effort to rewrite 3731(b). The Court should not do so either.

II. Section 3731(b)(2)'s Limitations Period Begins When an *Actual* Government Official Knows or Reasonably Should Know the Relevant Facts

If the Court rejects petitioners' convoluted interpretation of "[a] civil action under section 3730," petitioners offer an equally convoluted reading of 3731(b)(2)'s "the official of the United States charged with responsibility to act in the circumstances." Petitioners attempt to justify their interpretation of 3731(b)(2) with the same unsupported policy concerns they used to rationalize their reading of 3730(b). *Compare* Pet'r Br. 42–46 *with supra*, Part I.B. And like their first theory, petitioners' alternative theory is

neither consistent with the FCA's text nor even with itself. It too should be rejected.

1. Section 3731(b)(2)'s three-year limitations period begins when "facts material to the right of action are known or reasonably should have been known by *the official of the United States charged with responsibility to act in the circumstances*." 31 U.S.C. § 3731(b)(2) (emphasis added). This language plainly does not refer to relators. The phrase "official of the United States" appears in well over a hundred sections of the United States Code, and petitioners do not identify a single other occasion where this language encompasses individuals who are not employees of the federal government. *See, e.g.*, 5 U.S.C. § 5502(b); 10 U.S.C. § 948h; 16 U.S.C. § 5708(c); 22 U.S.C. § 3507(d)(3); 45 U.S.C. § 724(b). Section 3731(b)(2) should be construed "the same way." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

After all, an individual does not become an "official of the United States" by filing a *qui tam* complaint in federal court. At the very least, becoming an "official of the United States" requires swearing to support the Constitution—a requirement that obviously does not apply to relators. *See* U.S. Const. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (noting that "all officials take [an oath] to adhere to the Constitution"). Because they do not take the oath of office, relators are not "deputize[d]" to act with the authority

of the United States. *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 n.8 (9th Cir. 1996). Relators file suit of their own accord and often pursue their own "parochial interests." *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000); *id.* at 341 (observing that relators sometimes seek to "avoid the FCA's recovery division requirements by allocating settlement monies to the[ir] personal claims"). For this very reason, the FCA prohibits relators from settling FCA claims without the written consent of the Attorney General. *See* 31 U.S.C. § 3730(b)(1); *U.S. ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017); *Hoyte v. Am. Nat. Red Cross*, 518 F.3d 61, 64 n.2 (D.C. Cir. 2008); *Health Possibilities*, 207 F.3d at 339; *Searcy v. Philips Electronics of N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir.1997). *But see Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir.1994).

The sole textual evidence petitioners offer in support of their theory is their suggestion that relators "are the officials 'charged with responsibility to act' on behalf of the United States where the government itself has declined to intervene." Pet'r Br. 41. But 3731(b)(2) does not refer to just any individual "charged with responsibility to act"—it refers to "the official of the United States," and petitioners give no reason to believe that a relator is such an official.

2. Moreover, if Congress had intended to make the three-year limitations period run from the beginning of the relator's knowledge, it could have done so in a much more direct way. It might simply have

added a clause at the end of 3731(b)(2) so that the three-year limitations period began "when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances [or, in actions where the government does not intervene, by the relator]."

Congress did not do so, however, and neither has any State. The only State that comes close to adopting petitioners' rule is Maryland, which begins its three-year limitations period from the date the relevant facts are known or reasonably should have been known by "the relator, the State's Inspector General, or the Director of the State's Medicaid Fraud Control Unit." Md. Code Ann., Health-Gen. § 2-609(a); *see also* Md. Code Ann., Gen. Prov. § 8-108(a) (similar). But even Maryland's rule applies to *all* civil actions, and in any event Maryland effectively prohibits non-intervened suits: If the government does not intervene, the relator's action is dismissed. *See id.* § 2-604(a)(7); *see also* Md. Code Ann., Gen. Prov. § 8-104(a)(7) (same).

3. In addition to contradicting the statutory text, petitioners' interpretation of "official of the United States" is just as paradoxical as their interpretation of "[a] civil action under section 3730." They argue that when the government brings its own action, or when it intervenes in a relator's action, "the official of the United States" in 3731(b)(2) refers only to government officers or employees. Pet'r Br. 40. But when the government does not intervene in a relator's suit, petitioners maintain, this phrase's meaning changes so

that it refers to the relator. *Id.* Again, giving text such contingent meaning is not the way statutory interpretation is supposed to work. "To give these same words a different meaning . . . would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

***

Reduced to its essentials, petitioners' argument is that one non-textual turn deserves another: Because the Court permitted policy concerns to override 3731(b)'s literal meaning in *Graham*, so petitioners argue, the Court might as well do so again. But this misrepresents *Graham* and ignores the policy rationales that justify 3731(b)'s plain meaning. *Graham* found genuine textual ambiguity because both potential interpretations required inserting additional words into the statute. But that is not the case here, because 3731(b)'s plain meaning is perfectly sensible and administrable as it is. Section 3731(b) sensibly treats FCA actions brought by relators the same way as those brought by the government, and it prudently avoids altering the statute-of-limitations rules when the government chooses not to intervene. The Court does "not rewrite . . . statute[s] simply to accommodate . . . policy concern[s]." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). There is no reason for it to start now.

CONCLUSION

For these reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix
State False Claim Act / Fraud Prevention Act
Statutes of Limitations

Alaska: Alaska Stat. 09.10.075	
Description of Scope	**Description of Official**
"an action under AS 09.58.010--09.58.060"	"by the attorney general or the Department of Health and Social Services"
California: Cal. Gov't Code § 12654	
Description of Scope	**Description of Official**
"A civil action under Section 12652"	"the Attorney General or prosecuting authority with jurisdiction to act under this article"
Colorado: Colo. Rev. Stat. § 25.5-4-307	
Description of Scope	**Description of Official**
"A civil action under section 25.5-4-306(1) or (2)"	"the official of the state charged with responsibility to act in the circumstances"
Connecticut: Conn. Gen. Stat. § 4-285	
Description of Scope	**Description of Official**
"A civil action under sections 4-276 to 4-280, inclusive"	"the official of the state charged with responsibility to act in the circumstances"

Delaware: Del. Code tit. 6, § 1209	
Description of Scope	**Description of Official**
"A civil action under this chapter"	"the official of the Government charged with responsibility to act in the circumstances"
District of Columbia: D.C. Code § 2-381.02	
Description of Scope	**Description of Official**
"A civil action brought pursuant to § 2-381.02"	"the official of the District charged with the responsibility to act in the circumstances"
Florida: Fla. Stat. § 68.089asa	
Description of Scope	**Description of Official**
"A civil action under this act"	"the department" (defined as "Department of Legal Affairs")
Georgia: Ga. Code § 23-3-123	
Description of Scope	**Description of Official**
"all civil actions under this article"	"the state or local government official charged with the responsibility to act under the circumstances"
Hawaii: Haw. Rev. Stat. § 661-24	
Description of Scope	**Description of Official**
"An action for false claims to the State pursuant to this part"	"after the false claim is discovered or by exercise of reasonable diligence should have been discovered"

Illinois: 740 Ill. Comp. Stat. 175/5	
Description of Scope	**Description of Official**
"A civil action under Section 4"	"the official of the State charged with responsibility to act in the circumstances"
Indiana: Ind. Code § 5-11-5.5-9	
Description of Scope	**Description of Official**
"A civil action under section 4 of this chapter"	"a state officer or employee who is responsible for addressing the false claim"
Iowa: Iowa Code Ann. § 685.4	
Description of Scope	**Description of Official**
"A civil action under this chapter"	"the official of the state charged with responsibility to act in the circumstances"
Louisiana: La. Stat. § 46:439.1	
Description of Scope	**Description of Official**
"No qui tam action"	"the official of the state of Louisiana charged with responsibility to act in the circumstances"

Maryland: Md. Code, Health-Gen. § 2-609	
Description of Scope	**Description of Official**
"A civil action filed under this subtitle"	"known by the relator, the State's Inspector General, or the Director of the State's Medicaid Fraud Control Unit or reasonably should have been known"
Massachusetts: Mass. Gen. Laws ch. 12, § 5K	
Description of Scope	**Description of Official**
"A civil action pursuant to sections 5B to 5O, inclusive, for a violation of section 5B"	"the official within the office of the attorney general charged with responsibility to act in the circumstances"
Michigan: Mich. Comp. Laws § 400.614	
Description of Scope	**Description of Official**
"a civil action under section 10a"	"the official of the State of Michigan charged with responsibility to act in the circumstances"
Minnesota: Minn. Stat. § 15C.11	
Description of Scope	**Description of Official**
"An action under this chapter"	"the prosecuting attorney"
Montana: Mont. Code § 17-8-404	
Description of Scope	**Description of Official**
"A complaint or civil action filed under 17-8-405 or 17-8-406"	"the official of the government entity charged with responsibility to act in the circumstances"

Nevada: Nev. Rev. Stat. § 357.170	
Description of Scope	**Description of Official**
"An action pursuant to this chapter"	"the Attorney General or a designee of the Attorney General pursuant to NRS 357.070" (district or city attorneys may accept designation)
New Hampshire: N.H. Rev. Stat. § 167:61-b	
Description of Scope	**Description of Official**
"An action for false claims under RSA 167:61-c"	"the official within the office of the attorney general charged with responsibility to act in the circumstances"
New Mexico: N.M. Stat. § 27-14-13	
Description of Scope	**Description of Official**
"A civil action"	N/A (general 4-year statute of limitations applies)
New York: N.Y. State Fin. Law § 192	
Description of Scope	**Description of Official**
"A civil action under this article"	N/A ("ten years after the date on which the violation of this article is committed")
North Carolina: N.C. Gen. Stat. § 1-615	
Description of Scope	**Description of Official**
"A civil action under G.S. 1-608"	"the official of the State of North Carolina charged with responsibility to act in the circumstances"

New Jersey: N.J. Stat. § 2A:32C-11	
Description of Scope	**Description of Official**
"A civil action under this act"	"the state official charged with the responsibility to act in the circumstances"
Oklahoma: Okla. Stat. tit. 63, § 5053.6	
Description of Scope	**Description of Official**
"A civil action under Section 5053.2 of this title"	"the official of the State of Oklahoma charged with responsibility to act in the circumstances"
Rhode Island: 9 R.I. Gen. Laws § 9-1.1-5	
Description of Scope	**Description of Official**
"A civil action under § 9-1.1-4"	"the official of the state charged with responsibility to act in the circumstances"
Tennessee: Tenn. Code § 71-5-184	
Description of Scope	**Description of Official**
"A civil action under § 71-5-183"	"the official of the state charged with responsibility to act in the circumstances"
Texas: Tex. Hum. Res. Code § 36.104	
Description of Scope	**Description of Official**
"[T]he person bringing the action may proceed without the state's participation. A person proceeding under this subsection"	"the state knows or reasonably should have known facts material to the unlawful act"

Virginia: Va. Code § 8.01-216.9	
Description of Scope	**Description of Official**
"A civil action under § 8.01-216.4 or 8.01-216.5"	"the official of the Commonwealth charged with responsibility to act in the circumstances"
Vermont: Vt. Stat. tit. 32, § 639	
Description of Scope	**Description of Official**
"A civil action under section 632"	"the official within the Attorney General's office with responsibility to act in the circumstances"
Washington: Wash. Rev. Code § 74.66.100	
Description of Scope	**Description of Official**
"A civil action under RCW 74.66.040 or 74.66.050"	N/A ("any time")

No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL WHISTLEBLOWER CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Founded in 1988, the National Whistleblower Center ("NWC") is a nonprofit, tax-exempt organization dedicated to the protection of employees who lawfully report illegal conduct.[1] *See* www.whistleblowers.org. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject.

The NWC has participated before this Court as *amicus curiae* in *English v. General Elec.*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015); *Universal Health Svcs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016); and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk.

Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).

The NWC has long-standing experience advocating on behalf of *qui tam* whistleblowers. The NWC's work has firmly established that the merits of a claim often bear no relation to the duration of a case. One of many examples which illustrates this point is the *qui tam* case of Dr. Aaron Westrick. *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., et al.*, No. 04-0280 (D.D.C. July 25, 2018). With the support of the NWC, Dr. Westrick shared vital information with the government regarding the sale of defective body armor to the police and military. His *qui tam* case was filed on February 20, 2004 and a final settlement was not reached until 14 year later, on July 25, 2018. However, the merits of the case and its contributions to public health and safety are unquestionable. Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests (Mar. 15, 2018), https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet. The importance of the False Claims Act ("FCA"), even in cases that take an extended period of time to resolve, was well summarized by then Senate Judiciary Chairman Sen. Grassley: "Because of whistleblowers like Dr. Westrick, the False Claims Act is the most effective tool we have to fight government fraud." Sen. Charles Grassley, Chairman, Sen. Jud.

Comm., Keynote Address at National Whistleblower Appreciation Day (July 30, 2018) (transcript and video available at https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude).

SUMMARY OF THE ARGUMENT

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible government official's knowledge of the alleged false claim. This Court should affirm the holding of the U.S. Court of Appeals for the Eleventh Circuit.

The statute of limitations in the FCA is clearly set forth in the law. It would be inappropriate for the Court to weigh in on the issue given the plain language of the statute and the clear expressions of Congressional intent regarding a broad interpretation of the law.

The Chamber Amici[2] strenuously argued that the delays caused by a 10-year statute of

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[2] The "Chamber Amici" refers to the following organizations that joined in one amicus brief: U.S. Chamber of Congress, Pharmaceutical Research and Manufacturers

limitations in non-intervened cases cause hardship to defendants. They justified this argument with a statistical analysis of 2,086 non-intervened cases litigated between 2004 and 2013. Brief for the Chamber Amici, p. 16. However, the statistics relied upon by the Chamber Amici are flawed and inaccurate, resulting in a gross exaggeration of the alleged problems that would purportedly result from the Court upholding the 10-year limitations period. The degree to which their analysis is inaccurate renders their arguments into mere assertions, unsupported by the data that they cite. This Court should not rely upon the Chamber Amici's statistics for any purpose, and likewise reject the policy arguments the Chamber Amici allege the data supports.

Moreover, the False Claims Act is incredibly beneficial for both the public and private sectors. The Act's important role in government is highlighted by the bi-partisan support it receives from both members of Congress and Department of Justice officials, who have stressed that the FCA is essential to protecting the public fisc and rooting out corruption. For the private sector, the Act is

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of America, the National Association of Manufacturers, and the National Defense Industrial Association. *See* Brief for the Chamber of Commerce et al., as Amici Curiae Supporting Petitioners, *Cochise Consultancy, Inc., et al., Petitioners v. U.S., ex rel. Billy Joe Hunt*, No. No. 18-315 (U.S. Jan. 9, 2019) (hereinafter, "Brief for the Chamber Amici").

indispensable because it keeps dishonest companies from obtaining unfair advantages over other businesses, which would prevent them from freely competing in the marketplace.

Finally, Congress did not intend the statute of limitations to be the primary method of motivating the expeditious filing of FCA complaints. Instead, the first-to-file bar is a much stronger incentive that guarantees interested relators and their attorneys file their complaints as soon as possible. As a uniquely harsh provision, the first-to-file bar ensures expeditious filing much more efficiently than the statute of limitations.

The judgment below should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 31 U.S.C. § 3731(b) AFFIRMS THE ELEVENTH CIRCUIT'S HOLDING.

The relevant provision of the FCA in the instant case is 31 U.S.C. § 3731(b)(2), which provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or

> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

A plain reading of this provision grants relators the same deadlines under the statute of limitations as the United States and entitles relators to file a "civil action under section 3730" within the 10-year time period set forth in 31 U.S.C. § 3731(b)(2). This Court has stated that, "[i]n determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning."' *Moskal v. U.S.*, 498 U.S. 103, 108 (1990).

The efforts of Petitioner and the Chamber Amici to distort the statute should be viewed with the same skepticism that the Court has applied in the past to previous efforts of statutory misinterpretation. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) ("This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive."). 31 U.S.C. § 3731(b)(2) read plainly has only one reasonable meaning. *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (citation omitted) ("Where the language is

plain and admits of no more than one meaning the duty of interpretation does not arise."). The language clearly states that the ten-year statute of limitations applies equally to both relators and government officials and to any civil action brought under section 3730.

II. THE PLAIN MEANING OF THE 10-YEAR STATUTE OF LIMITATIONS IS CONSISTENT WITH THE POLICY DECISIONS OF CONGRESS WHEN AMENDING THE FCA AFTER 1986 TO EXPAND AND STRENGTHEN THE RIGHTS OF RELATORS TO BRING CIVIL ACTIONS UNDER THE FCA.

The length of the statute of limitations for any particular statute is a policy-based determination properly decided by the Legislature. Petitioner is asking this Court to inappropriately reduce the filing period for relators, when they ought to take their qualms to to Congress. The Petitioner, the Chamber Amici and other organizations supporting the Petitioner as amici curie have failed to do so because members of Congress and Department of Justice officials (who have extensive experience litigating FCA claims) strongly endorse a broad reading of the law. Moreover, although the law has been amended several times since 1986, providing numerous opportunities to Congressional members to limit the statute, the Legislature has repeatedly decided not to shorten the statute of limitations.

Instead of amending the law to reduce the ability of relators to file cases, Congress has consistently *expanded* the ability of relators to file claims. *See* Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (expanding the statute of limitations for filing retaliation cases in most states); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (expanding coverage to apply to the Affordable Care Act); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (expanding the scope of liability of those who receive government funds).

The support for the FCA by members of Congress and the DOJ is universal. For example, in 2009 Congress passed numerous amendments to the FCA as part of the Fraud Enforcement and Recovery Act ("FERA"). The Senate Report on FERA, which was unanimously approved by the Committee on the Judiciary, explained:

> FERA improves **one of the most potent civil tools for rooting out waste and fraud in Government—the False Claims Act** (18 U.S.C. § 3729 *et seq.*). The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law .... The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds

> expended in response to our current economic crisis."

Sen. Jud. Comm. Rep., "Fraud Enforcement and Recovery Act," March 23, 2009, S. Rep. 111-10, p. 4 (emphasis added).

The Senate Report further explained:

> One of the **most successful tools** for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an **extraordinary civil enforcement tool** used to recover funds lost to fraud and abuse.

Id. at 10 (emphasis added).

The Congressional Budget Office confirmed that the FERA amendments were designed to *encourage* the filing of *additional* FCA cases by *qui tam* relators: "CBO estimates that the provisions relating to the FCA would, on net, increase civil fines and recoveries collected by the federal government because it would likely lead to the initiation of additional claims under FCA. S. 386 also could increase collections of civil and criminal fines for violations of the bill's other provisions." *Id. at* 17.

Senator Charles Grassley, former chair of the Senate Judiciary Committee and an original sponsor of the FCA, is one of the most qualified individuals to speak about the benefits of the

FCA, given his familiarity with the law over the past 33 years. Senator Grassley has continuously voiced his support for the law, recently praising the use of the FCA in the case of Dr. Aaron Westrick, despite the fact that the case took over 14-years to litigate. As explained by Senator Grassley, Dr. Aaron Westrick helped the government recover more than $67 million in lost funds and protected law enforcement personnel from the risk caused by defective body armor:

> Because of whistleblowers like Dr. Westrick, the False Claims Act is the most effective tool we have to fight government fraud. Opponents of the False Claims Act are often skeptical about its reward provisions. They assume whistleblowers are motivated by self-interest or greed, and the rewards just encourage bad behavior. But the reward programs are not about what whistleblowers gain by blowing the whistle. They're about everything the whistleblowers stand to lose ... The truth is that whistleblowers are so ostracized and reviled, they suffer retaliation for speaking up. In a lot of cases it costs them their livelihood and their reputations. And if they get fired, they can't just go out and get another job, because they've been blacklisted. So they incur huge legal costs at the same time they lose their income, maybe for a long time.

Sen. Charles Grassley, Chairman, Sen. Jud. Comm., Keynote Address at National Whistleblower Appreciation Day (July 30, 2018) (transcript and video available at https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude).

When discussing the settlement reached in the same *Westrick* FCA case, former Attorney General of the Department of Justice Jeff Sessions, said:

> Bulletproof vests are sometimes what stands between a police officer and death ... Selling material for these vests that one knows to be defective is dishonest and risks the lives of the men and women who serve to protect us. The Department of Justice is committed to the protection of our law enforcement officers, and today's resolution sends another clear message that we will not tolerate those who put our first responders in harm's way.

Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests, https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet.

The FCA has received strong bi-partisan support. Not only did President Trump's former Attorney General praise the FCA in the Westrick case, the former Obama Administration Attorney General Eric Holder said of the act:

> [T]he False Claims Act has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of American taxpayers. Since the day that President Reagan signed these bipartisan amendments into law in 1986, their impact has been nothing short of profound . . . Some of these [False Claims Act cases] may have saved lives. All of them saved money. And – taken as a whole – this remarkable track record represents a wide-ranging effort to eradicate the scourge of fraud from some of government's most critical programs.

Former Att'y Gen. Eric Holder, Address at the 25th Anniversary of the False Claims Act Amendments of 1986 (Jan. 31, 2012) (transcript available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986).

In testimony before the Senate Judiciary Committee, Michael Hertz, the Deputy Assistant

Attorney General of the Civil Division of the Department of Justice, explained that the FCA has had a tremendously successful deterrent effect:

> In the wake of well-publicized recoveries attributable to the *qui tam* cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the 'watchdog' effect of the qui tam statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.

Sen. Jud. Comm. Rep., "The False Claims Act Correction Act Of 2008," Sept. 25, 2008, S. Rep. 110-507, p. 8.

The testimony and public comments of these officials are objectively supported by the available data concerning FCA recoveries. For example, in the 2017 fiscal year, the U.S. government recovered over $3.7 billion through its civil fraud program. Press Release, Department of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017. Of this amount, whistleblowers were directly responsible for the detection and reporting of over $3.4 billion, or 91.8% of all civil fraud recovered under *qui tam*

provisions. *Id.* Deputy Associate Attorney General Stephen Cox explained:

> The False Claims Act is our most important civil enforcement tool to protect the taxpayer from fraud, and using this tool effectively is very important to this Administration and our Department of Justice.
>
> This past fiscal year, the Department recovered more than $3.4 billion for the Treasury using the False Claims Act. Since the 1986 amendments, the Department has recovered a total of $56 billion. These cases are not only about protecting the public fisc through financial recoveries. There are victims of fraud other than the taxpayer, and the False Claims Act protects these potential victims by deterring bad actors. When a company falsely certifies the quality of military equipment, it sends our brave men and women into harm's way with less protection. When medical providers submit false claims to Medicare, they often fail to provide adequate medical care to their patients. Kick-back schemes not only defraud the government, they also drive up consumer costs, undermine competition, and may distort independent medical decision-making.

Dep. Assoc. Att'y. Gen., Stephen Cox, Address at Federal Bar Association Qui Tam Conference (Feb. 28, 2018) (transcript available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association).

Stephen Cox also emphasized the important role of relators in False Claims Act,

> As we all know, the success of the False Claims Act is due in large part to the partnership between the federal government and whistleblowers. Since 1986, nearly 70% of all False Claims Act recoveries can be attributed to qui tam matters. And of the recoveries last year, more than $3 billion was recovered in qui tam cases.

Id.

Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division noted the importance of encouraging relators to file *qui tam* lawsuits:

> Whistleblowers have played a vital role in unmasking fraudulent schemes that might otherwise evade detection ... The taxpayers owe a debt of gratitude to those who often put much on the line to expose such schemes.

Press Release, Department of Justice, Japanese Fiber Manufacturer to Pay $66 Million for Alleged False Claims Related to Defective Bullet Proof Vests (Dec. 21, 2018), https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet.

It is little wonder why Petitioner and their supporting amici have foregone attempts to convince Congress to roll-back provisions of the FCA and are instead urging this Court to enter a policy debate that they have already lost in Congress and the court of public opinion.

III. THE STATISTICAL ANALYSIS IN THE CHAMBER AMICI BRIEF IS FLAWED AND CANNOT BE RELIED UPON.

The Chamber Amici relies upon flawed and misleading statistics to justify their policy position that the Court should misconstrue the FCA and limit the scope of the ten-year statute of limitations. The Chamber Amici cites statistics based upon an excel spreadsheet of FCA cases, previously cited by the Chamber in their amici brief filed in *Gilead Scis., Inc. v. U.S. ex rel. Campie*. *See* Brief for the Chamber of Commerce et al. as Amici Curiae Supporting Petitioners at 13, *Gilead Scis., Inc. v. U.S. ex rel. Campie*, 138 S. Ct. 1585 (2018) (No. 17-936); Brief for the Chamber Amici at 16. The Chamber Amici argue the spreadsheet demonstrates that a large percentage of relators purse non-meritorious

cases three or more years after the United States already declined to intervene, inflicting hardship upon defendants in FCA cases through litigation costs.

The Chamber Amici stated the following in their brief:

> More broadly, False Claims Act litigation is time consuming and costly. False Claims Act actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. They also frequently last a long time. As the Chamber has noted in another recently filed amici brief before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Chamber of Commerce of the United States of America et al. Amici Br. 13, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Id.

The statistical analysis referenced above is flawed, misleading and inaccurate. The NWC reviewed the excel spreadsheet relied upon by the Chamber Amici by utilizing PACER[3] to download docket sheets and other court documents from the cited cases. In contrast to the spreadsheet cited by the Chamber Amici, the data derived from publicly available docket sheets demonstrate an accurate picture of the duration of the cited cases. The review firmly establishes that the spreadsheet relied upon by the Chamber Amici was materially flawed and should not have been presented to this Court.

The NWC reviewed the Electronic Case File of each case cited by the Chamber Amici to determine the actual number of cases that took place between 2004 and 2013, resulted in zero recovery, and lasted over 1,095 days (*i.e.* 3-years), from the date of the Justice Department's declination of intervention, to the date of the ultimate dismissal of the case.

According to the court records available on PACER, at least 112 of the cases between 2004 and 2013 which the spreadsheet indicated went

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[3] "PACER" stands for Public Access to Court Electronic Records of the U.S. Courts and it is "an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator." *See* https://www.pacer.gov.

over the 3-year period, in fact were dismissed prior to the marker. The Chamber Amici's statistics were almost 50% inaccurate based on a review of this one indicator alone. A copy of the Electronic Case File Docket Sheets for these 112 cases were printed by the counsel for the NWC and are available at https://www.kkc.com/assets/site_18/files/fca/date-discrepancy-court-files-toc.pdf.

Moreover, in reviewing the cases which the spreadsheet cited by the Chamber Amici indicated resulted in zero recovery, the docket sheets and other court documents located in PACER actually show that some of these cases did in fact result in recoveries for the United States and/or state governments. The NWC's review identified no less than 6 such cases. A copy of the Electronic Case File Docket Sheets for these 6 cases were printed by counsel for the NWC and are available at https://www.kkc.com/assets/site_18/files/fca/Recovery-Court-Files-TOC.pdf.

Furthermore, the data demonstrates that the duration-based argument raised by the Chamber Amici is analytically flawed. The reasons that some cited cases extended beyond the three-year threshold set by the Chamber Amici often had nothing to do with the merits of a case and would not have been cured by shortening the statute of limitations. For example, in *U.S. ex rel. Bane v. Breathe Easy Pulmonary Servs.*, the case ran long in part

because the *Defendant* requested or stipulated to multiple extensions of time, undercutting the argument that the length of time these cases may take prejudices the defense. *U.S. ex rel. Bane v. Breathe Easy Pulmonary Servs.*, 597 F. Supp. 2d 1280 (M.D. Fla Jan 23, 2009). A copy of the Electronic Case File Docket Sheets for this case was printed by counsel for the NWC and is available at https://www.kkc.com/assets/site_18/files/fca/example-court-files-toc.pdf. It is illogical to assert that a company would request or consent to at least thirteen extensions, stays, and a mediation postponement, if they were being prejudiced by those very delays. Regardless, the fact that there were multiple extensions of time stipulated to by the parties does not support a policy argument for shortening the statute of limitations to bar filing a suit.

Likewise, the docket sheets show that other intervening factors in cases caused delay, such as a stay of proceedings due to bankruptcy such as in *U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc. U.S. ex rel. Watine v. Cypress Health Sys. Fla., Inc.*, No. 1:09-cv-00137-SPM-GRJ, 2012 U.S. A copy of the Electronic Case File Docket Sheets for this case was printed by counsel for the NWC and is available at https://www.kkc.com/assets/site_18/files/fca/example-court-files-toc.pdf.

Finally, even if one accepts the Chamber Amici's analysis on its face, the resulting

numbers mean that 87% of FCA cases between 2004 and 2013 did not extend for more than 3 years when the government declined to intervene and resulted in zero recovery. It would also mean that 95% of FCA cases between 2004 and 2013 did not extend for more than 5 years after the government declined to intervene and resulted in zero recovery.

IV. THE FIRST TO FILE PROVISION RENDERS THE CHAMBER AMICI'S ARGUMENTS IRRELEVANT.

Congress did not intend for the statute of limitations provision of the FCA to be the primary tool driving the expeditious filing of *qui tam* lawsuits. The FCA has a "first-to-file" bar,[4] thus unlike other laws where a party can wait until the statute of limitations is almost over in order to file a case, the first-to-file bar negates this approach.

If a relator delays in filing a claim, his or her case may be dismissed *not* under a statute of limitations analysis, but under the "first-to-file" bar. To illustrate, if a relator waits until the statute of limitations is about to expire before filing a claim, another whistleblower may have

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[4] In *KBR v. U.S. ex rel Carter*, 135 S.Ct. 1970, 1978 (2015), this Court explained the "first-to-file" rule that governs all *qui tam* cases: "The first-to-file bar provides that '[w]hen a person brings an action ... no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action.' 31 U.S.C. § 3730(b)(5)."

already filed a similar claim, and consequently the tardy whistleblower's claim would be dismissed, even if it was filed within the limitations period. The FCA was built with a major incentive encouraging relators to file claims well before the statute of limitations expires.

The first-to-file rule is harsh and unique. It promotes the expeditious filing of claims because any delay risks the dismissal of a claim, not under a statute of limitations analysis, but under the first-to-file bar.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

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No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BILLY JOE HUNT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS AMICUS CURIAE SUPPORTING RESPONDENT

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AMICUS CURIAE BRIEF[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief in support of respondent.

INTEREST OF THE AMICUS

TAFEF is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the qui tam provisions of the False Claims Act ("FCA"), has participated in litigation as amicus curiae, and has provided testimony to Congress about ways to improve the FCA.

TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986—contemporaneously with the statutory amendments at issue in this case. TAFEF is supported by whistleblowers and their counsel and funded by membership dues and foundation grants.

TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. In this case, TAFEF's interest is in ensuring that the statute of limitations applicable to whistleblower claims—including in declined cases—is interpreted

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[1] This brief is filed with the consent of all parties, reflected in blanket consent letters filed with the Court. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for the amicus made any monetary contribution toward the preparation and submission of this brief.

consistently with the statutory text and Congress's purposes in enacting the 1986 amendments.

SUMMARY OF ARGUMENT

Section 3730 of the FCA provides a cause of action to redress fraud against the United States. Such actions may be brought by the United States, but are most often brought by qui tam relators. When a relator brings the action, the United States may intervene—but frequently, the United States declines to intervene and allows the relator to carry the action forward.

The timeliness of these actions is governed by Section 3731(b) of the FCA, which sets forth two alternative limitations periods: a six-year period that begins when the fraud occurs; and a three-year period that begins when the responsible official of the United States discovers facts material to the fraud, subject to a ten-year statute of repose. As between these two periods, the statute provides that "whichever occurs last" shall govern.

This case is about whether the ordinary statute of limitations applies in the ordinary qui tam case in which the United States declines to intervene (respondent's position), or whether instead only the first half of Section 3731(b) applies in such cases (petitioners' position). The statutory text answers that question clearly in respondent's favor.

I. Section 3731(b) applies without regard to the identity of the plaintiff. Thus, under the clear terms of Section 3731(b), either limitations period may apply to a qui tam relator's civil action under Section 3730—whether the government subsequently intervenes or not. Petitioners disparage this plain-text reading as "hyperliteral," Petr. Br. 3, 11, "unduly literal," Petr. Br. 15, and "literalistic," Petr. Br. 35. We take these accusations as compliments. To read the statute "literally" is to adhere to its ordinary construction or meaning, without embellishment. That is what this Court ordinarily strives to do—and it is what the Court should do here.

A. All of the ordinary tools of statutory interpretation favor respondent's reading of Section 3731(b). Respondent's interpretation is faithful to the ordinary meaning of the words Congress used, and gives each provision a single, clear effect. It treats all civil actions to redress fraud against the United States consistently; it gives meaning to the phrase "whichever occurs last"; and it avoids the oddity of conditioning the applicable limitations period on the government's post-filing decision whether to intervene.

Petitioners' interpretation, on the other hand, is inconsistent with the statutory text. To make petitioners' interpretation work, the single statutory phrase "civil action under section 3730" must hold two, mutually exclusive meanings: it must simultaneously include qui tam actions in which the government has not intervened (for purposes of subsection (b)(1)) and exclude those very same actions (for purposes of subsection (b)(2)). But that maneuver is squarely foreclosed by this Court's decision in *Clark v.*

Martinez, 543 U.S. 371, 386 (2005), which rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases."

The statutory context likewise supports respondent's interpretation. Throughout the FCA, Congress demonstrated that it knows how to distinguish between the United States and private relators. Congress also knows how to modify statutes of limitations to account for the government's intervention decisions.

In an effort to displace the ordinary meaning of the statute, petitioners rely on this Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), which held that the phrase "civil action under section 3730" does not cover FCA retaliation claims. *Graham* actually supports respondent: the Court there clearly distinguished fraud claims (like this case), which are subject to Section 3731(b), from retaliation claims, which are not. To the extent *Graham* provides guidance about statutory interpretation more generally, it stands only for the unremarkable proposition that the words of a statute should be read in context to avoid absurd results. But *Graham* provides no support for petitioners' more radical theory that the phrase "civil action under section 3730" simultaneously holds multiple, mutually exclusive meanings.

Petitioners also argue that their interpretation is consistent with a default rule that tolling provisions and discovery rules normally begin to run when the plaintiff discovers a fraud. They contend that because Section 3731(b)(2) makes the government's discovery the relevant trigger, the government is the only

eligible plaintiff. That argument puts the cart before the horse. The reason discovery rules ordinarily turn on the plaintiff's knowledge is because the plaintiff is typically also the victim of a fraud. But when, as here, the victim and the plaintiff are different people, the ordinary rule is that the victim's knowledge controls. For example, when a victim assigns a claim to a plaintiff, the assignor victim's knowledge determines when the limitations period begins to run. Thus, the applicable default rule actually favors respondent.

B. The statutory purpose and legislative history also support respondent's interpretation. Petitioners extract snippets from the legislative history of Section 3731(b) showing that Congress intended to grant a benefit to the government—and they proceed from there to the conclusion that Congress meant to deny that benefit to qui tam relators.

Petitioners' argument reflects a deep misunderstanding of the relationship between relators and the government. Congress enacted the current version of Section 3731(b) as part of a comprehensive effort to revitalize the FCA's qui tam provisions and encourage more private suits. Congress believed that increased private enforcement was the only way to stem the tide of fraud against the government—and it therefore understood that private civil actions (including actions in which the government does not intervene) serve a vital public purpose. Respondent's interpretation preserves more of these actions, and conserves public resources by allowing the government to decline intervention without forfeiting its right to recover stolen funds.

Petitioners' argument is also unpersuasive because, at most, it proves that the solution Congress

chose is broader than the problem it sought to address. But that happens all the time. What we know for sure is that Congress regarded the six-year statute of limitations as inadequate and sought to lengthen it. There is no evidence that it only wished to do so selectively in a way that would disadvantage qui tam relators—the very individuals it was encouraging at the time.

Petitioners warn of policy consequences if the statute is interpreted as written. They worry that relators will sit on their claims to pad the damages, and that the government will face burdensome discovery into its knowledge. But none of these supposed practical problems outweighs the policy concerns on the other side: that claims to recover money for the government will fail unless the government spends its own resources to take over the case; and that relators may choose not to come forward if they fear that their declined claims will be dismissed as time-barred or limited in scope. In any event, petitioners' concerns are meritless. Congress provided strong incentives for relators to file promptly—including the first-to-file bar and the public disclosure bar. Moreover, discovery regarding the government's knowledge is likely to be limited, and is already occurring in connection with the merits of FCA actions.

II. Section 3731(b)(2) provides that the three-year discovery period begins to run when "the official of the United States charged with responsibility to act in the circumstances" learned or should have learned about facts material to the fraud. In other words, the discovery clock starts running when a government official learns of the fraud.

Petitioners argue that in declined cases, it is the qui tam relator's knowledge that starts the clock. But a private relator is not an "official of the United States." The relator is not even a government employee—let alone an "official" "charged" with a duty to act in the face of fraud. Instead, the relator is a private individual who is permitted to pursue an action for the government's benefit—but is not able to bind the government or exercise the government's authority. Petitioners have no plausible explanation for how the government's decision to decline intervention transforms a private individual into a government official.

Taken at face value, petitioners' interpretation also risks rendering the discovery rule a nullity in declined cases. Even if a relator becomes an official of the United States at the moment of declination, there would be no justification for using the relator's knowledge prior to that date to start a limitations period. Thus the statute of limitations would begin to run on the declination date—which necessarily occurs after the suit is filed. The fact that petitioners' interpretation compels that absurd result discredits petitioners' argument.

This Court should affirm.

ARGUMENT

I. The False Claims Act's statute of limitations applies equally to every plaintiff.

A. Section 3731(b) unambiguously applies to all suits to redress fraud against the United States.

Section 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Section 3731(b) has a single, clear meaning: the statute applies in full to civil actions under Section 3730—whether brought by the government or a qui tam relator, and whether the government decides to intervene or declines to do so. In every such action, whichever limitations period occurs last governs.

Petitioners urge a different interpretation: they want the limitations period set forth in Section 3731(b)(2) to apply to only those civil actions in which the government is the plaintiff, either because it sues or subsequently intervenes. To write a statute that

works the way petitioners propose, Congress could have easily written something like this:

> (b)
>
> (1) A civil action under section 3730(b) in which the United States has subsequently chosen not to intervene may not be brought more than 6 years after the violation of section 3729 is committed.
>
> (2) A civil action under section 3730(a) or under section 3730(b) in which the United States subsequently chose to intervene may not be brought
>
> (i) more than 6 years after the violation of section 3729 was committed, or
>
> (ii) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

But of course, Congress did not enact that statute—and the striking contrast between the actual statute and petitioners' desired alternative reveals how far petitioners have strayed from the text. Under this Court's precedents, the choice between these competing interpretations is clear.

1. Respondent's interpretation is the only one consistent with the statutory text.

The key inquiry for deciding whether Section 3731(b) applies to any particular action is whether that action is a "civil action under section 3730," *i.e.*, an action under the FCA to redress fraud against the United States. If it is, the later date between (b)(1) and (b)(2) applies.

This case—like every other FCA fraud case—was brought "under section 3730." *See* 31 U.S.C. § 3730(b)(1) (permitting any person to bring a civil action alleging a violation of Section 3729); *id.* § 3730(c)(3) (allowing a relator to continue to conduct a private action after the United States declines to intervene); Petr. Br. 7 (acknowledging that this case is a "civil action under section 3730" for the purposes of Section 3731(b)(1)). Thus, under the plain text, Section 3731(b)(2) is available—and it applies because it occurred last. That should be the end of the matter.

Petitioners' contrary interpretation demands that this Court give a single statutory phrase—"civil action under section 3730"—two mutually exclusive meanings. To make petitioners' theory work, that term must include qui tam suits where the government declines to intervene for purposes of subsection (b)(1), and exclude those very same suits for purposes of subsection (b)(2).

This Court has emphatically rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (explaining that "a *single* [statutory] formulation"

should be construed "the same way each time it is called into play"). The provision of the Immigration and Nationality Act at issue in *Clark* said that three categories of aliens "may be detained beyond the removal period." 543 U.S. at 377 (quoting 8 U.S.C. § 1231(a)(6)). The Court had previously held that, with respect to one of the three categories, the phrase "may be detained beyond the removal period" meant that the aliens could be detained "only so long as 'reasonably necessary' to remove them from the country." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001)). The question presented in *Clark* was whether that limitation applied to another of the categories of aliens as well. *Id.* at 378. This Court held that the answer "must be yes" because the operative statutory language "applies without differentiation to all three categories of aliens that are its subject," so that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id. Clark* dooms petitioners' attempt to give multiple meanings to the phrase "civil action under section 3730" because, as with the statute in *Clark*, this umbrella term applies without differentiation to both subsections of Section 3731(b).

Even if this Court were convinced that Congress might have intended the meaning of the umbrella term "civil action under section 3730" to vary according to subsection, that argument would be foreclosed by Section 3731(b)'s coda. Congress did not merely provide that Section 3731(b) applies to "civil action[s] under section 3730"—it also instructed courts to apply "whichever" of the two available limitations periods "occurs last" *to each such action*. The resulting statutory sandwich makes it impossible for "civil

action under section 3730" to mean one thing with respect to Section 3731(b)(1) and another thing with respect to Section 3731(b)(2), because the two subsections work in tandem, setting up alternative time limits applicable to a single action. Petitioners' argument, therefore, must be that the term "civil action under section 3730" does not just have different meanings with respect to Sections 3731(b)(1) and 3731(b)(2), but also means one thing with respect to declined relator suits, in which case Section 3731(b)(1) alone applies and the coda disappears, and another thing with respect to suits initiated by the government or in which the government has intervened, in which case either Section 3731(b)(1) or Section 3731(b)(2) might apply and the coda magically reappears. This stretches the statute's language past its breaking point.

It gets worse. Petitioners' interpretation requires "civil action under section 3730" to assume different meanings *in the same civil action*. According to petitioners, before the government decides whether to intervene in a relator's suit, the suit qualifies as a "civil action under section 3730" for the purposes of Section 3731(b)(1), but not Section 3731(b)(2) or the coda. But then, if the government intervenes, that same relator-initiated action suddenly becomes a "civil action under section 3730" for purposes of Section 3731(b)(1) or Section 3731(b)(2), and the coda decides which one. Surely Congress did not intend the meaning of "civil action under section 3730" to be indeterminate until the government decides whether to intervene.

The statutory context confirms respondent's interpretation. In Section 3731(c), which is

immediately adjacent to the statutory provision at issue in this case, Congress demonstrated that it knows how to write special rules for subsets of civil actions under Section 3730. Congress provided that, "[i]f the Government elects to intervene and proceed with an action brought under 3730(b)" and files its own complaint in intervention, then "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action." 31 U.S.C. § 3731(c). Thus, Congress recognized a distinction between actions brought by the government itself under Section 3730(a) and actions brought by relators under Section 3730(b)—and it further provided a special statute of limitations rule that applies only if the government elects to intervene. But of course, Congress did no such thing in Section 3731(b).[2]

Elsewhere, when the FCA distinguishes between the rights of relators and the rights of the government, it does so expressly. *See, e.g.*, 31 U.S.C. § 3730(b)(4)(A) (permitting the government to take over a relator-initiated action); *id.* § 3730(c)(1) (granting the government primary responsibility for conducting an intervened suit); *id.* § 3730(c)(2)(A) (permitting the

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[2] Outside the FCA, Congress has demonstrated that it knows how to write a statute of limitations that provides different limitations periods for different types of actions. *See, e.g.*, 28 U.S.C. § 3306(b) (setting forth different limitations periods for different types of fraudulent transfer actions); 42 U.S.C. § 9613(g)(2) (different limitations periods for different types of actions under the Comprehensive Environmental Response, Compensation, and Liability Act).

government to dismiss an intervened action without the relator's consent); *id.* § 3730(c)(2)(B) (permitting the government to settle an intervened suit without the relator's consent); *id.* § 3730(c)(3) (permitting the relator to pursue a declined action). Section 3731(b)(2) contains no such distinction between relators and the government. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (alteration in original) (internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Petitioners make their own appeal to statutory context. *See* Petr. Br. 3, 10-11, 13-15, 17-18, 21, 39. They identify various features of the FCA suggesting that the limitations period of Section 3731(b)(2) is available to the government—*e.g.*, that the phrase "official of the United States" appears in the subsection, and the fact that the statutory language was cribbed from a statute of limitations for claims by the United States. At most, these citations prove a proposition that nobody is disputing: that Section 3731(b)(2) is intended to help the government. But it does not follow that Section 3731(b)(2) is available *only* to the government. As explained in detail in Part B, *infra*, the principal way that Congress sought to help the government in 1986 was by encouraging more qui tam suits; thus, Congress understood that helping relators also necessarily helps the government.

The sparse and oblique contextual clues petitioners cite cannot overwhelm the contrary evidence of Congress's intent—and they cannot support the radical interpretation petitioners propose. To be sure, this Court regularly relies on statutory context in deciding how broadly a particular statutory term should apply—as it did in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), where the Court reasoned that the phrase "civil action under section 3730" must exclude retaliation actions altogether. But this Court has never suggested that context can give a single statutory term two concurrent, irreconcilable meanings, in violation of the clear rule set forth in *Clark*. Indeed, in *Clark* itself, the Court acknowledged that "the statutory purpose and the constitutional concerns" that had motivated its prior decisions did not apply with equal force to aliens who had not been admitted to the United States. 543 U.S. at 380. But it held that this difference "cannot justify giving the same detention provision a different meaning when such aliens are involved." *Id.*

Searching for ambiguity in a clear statute, petitioners invoke the canon against superfluity, arguing that applying Section 3731(b) to claims brought by relators would cause Section 3731(b)(1) to become "'superfluous in nearly all' relator-initiated cases in which the United States does not intervene." Petr. Br. 27 (quoting *United States ex rel. Sanders v. N. Am. Bus Indus.*, 546 F.3d 288, 295 (4th Cir. 2008)). This argument fails for two reasons.

First, reliance on the canon against superfluity is misplaced here: Even petitioners do not argue that subsection (b)(1) would be rendered entirely superfluous; they simply argue that it would govern fewer cases. The canon against superfluity, however, is not a canon against relative disuse under specific circumstances; rather, it forbids statutory interpretations that render provisions "inoperative or superfluous, void or insignificant." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 393 (2013) (internal quotation marks omitted) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Petitioners have not shown that applying the statute of limitations as written would produce that result. They speculate that cases in which "the government learned about the fraud within the first three years of its occurrence but then declined to file its own suit" are "likely to be rare." Petr. Br. 28. Even if the Court takes that statement at face value, it does not establish superfluity. But the Court should not take that statement at face value. Petitioners cite no authority to support it, and in fact they contradict themselves later in their brief. In making their alternative argument that relators become "officials of the United States" for purposes of Section 3731(b)(2), petitioners ask this Court's solicitude for precisely those cases where the government "learned about the alleged fraud the day after it occurred but decided not to file suit due to resource constraints," Petr. Br. 44 (cases that, it bears mentioning, would be barred by petitioners' primary argument).

Second, rendering the shorter limitations period in subsection (b)(1) less salient was the entire point of the 1986 amendment to Section 3731(b). Congress

added a longer statute of limitations, and compelled courts to apply whichever limitations date "occurs last," for a reason: it wanted subsection (b)(1) to apply in fewer cases. The fact that subsection (b)(2) will apply in some cases—or even in most—does not mean that subsection (b)(1) has been rendered superfluous; it means that the statute works as intended.

2. *This Court's decision in* Graham *does not support petitioners' interpretation; it does the opposite.*

In a plea to ignore the plain text, petitioners turn to *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005), claiming that the case "explicitly disavowed" a "hyperliteral" reading of Section 3731(b). Petr. Br. 3. Petitioners all but ignore the unique facts of that case, which resolved an entirely unrelated question: whether Section 3731(b) applies *at all* to FCA retaliation claims. *Graham*, 545 U.S. at 414. Retaliation claims obviously present different concerns than fraud claims under the FCA. Most clearly, they do not accrue when the fraud occurs; they accrue when the retaliation occurs.[3] Mindful of the distinction, *Graham* read the term "civil action under Section 3730" to include government and relator actions under subsections 3730(a) and (b), but not

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[3] Antiretaliation provisions routinely have distinct statutes of limitations from the substantive provisions of a statute, for exactly the reasons the Court identified in *Graham*. *See, e.g.*, 7 U.S.C. § 26(h)(1) (establishing a separate statute of limitations for commodities whistleblowers); 15 U.S.C. § 78u-6(h)(1) (same for securities whistleblowers); 18 U.S.C. § 1514A(b)(2)(D) (same for whistleblowers under the Sarbanes-Oxley Act).

retaliation actions under subsection 3730(h), thereby avoiding the bizarre result that a retaliation action might otherwise be "time barred before it ever accrue[d]." *Id.* at 421. But while *Graham* illustrated the principle that the statute may be read narrowly to avoid absurd results, it never once suggested that the same statutory term could be read two different ways at the same time.

In fact, to the extent *Graham* has anything to say about this case, it supports respondent's interpretation. The Court in *Graham* frequently drew a distinction between retaliation claims on the one hand and actions for fraud on the other. *See* 545 U.S. at 415-18 (repeatedly and consistently distinguishing between "§§ 3730(a) and (b)" actions (fraud actions) and "§ 3730(h)" retaliation actions). The post-*Graham* amendment to Section 3730(h) ratified this distinction by creating a special statute of limitations for retaliation claims while leaving Section 3731(b) as the operative statute of limitations for all fraud claims. *See* 31 U.S.C. § 3730(h)(3) (providing a limitations period of "3 years after the date when the retaliation occurred").

3. Petitioners' interpretation is not compelled by any "default rule" of statutory interpretation.

Petitioners fall back on "[d]efault limitations rules," arguing that it would be anomalous for tolling provisions to turn on the knowledge of a non-party. Petr. Br. 22-26. Where Congress has spoken, however, the plain meaning of the statute trumps every default rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). For the many reasons given above, that is the case here.

In any event, petitioners misstate the default rule. In fraud cases, statutes of limitation often run from the date the *victim* "discovers" or should have discovered her injury. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 644-45 (2010); *see also* 37 Am. Jur. 2d Fraud and Deceit § 333 (2019). Because the victim is almost always the plaintiff in the ensuing case, the discovery rule normally turns on "the knowledge and actions of *the plaintiff*, not a third party." Petr. Br. 24 (quoting *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012)).

But the victim's knowledge controls even when the victim is not the plaintiff. Here, respondent is not the fraud victim; he sues "as a partial assignee of the United States." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000) (emphasis omitted). Generally, "an assignee cannot maintain a claim in the face of a limitations defense that would have trumped the same claim had it been brought by the assignor," even though the assignor, by definition, is unlikely to be a party to the case. 51 Am. Jur. 2d Limitation of Actions § 61 (2019); *see also FDIC v. Bledsoe*, 989 F.2d 805, 809-810 (5th Cir. 1993) (reasoning that FDIC's six-year period for collecting on debt obligations applies to FDIC's private assignees, even where private parties would enjoy a shorter period if suing on their own claims); 6A C.J.S. Assignments § 133 (2018). This rule is long-standing. *See, e.g.*, *Avery v. Cleary*, 132 U.S. 604, 610-12 (1890); *see also Campbell v. Wilson*, 13 D.C. (2 Mackey) 497, 500-01 (D.C. 1883).

Put simply, for assigned claims, applying a discovery rule makes the claim's timeliness turn on a nonparty's knowledge. This Court recognized as much over a century ago, when Justice Harlan held that a second bankruptcy trustee could not claim the benefit of the discovery rule where an earlier trustee—not party to the litigation—had reason to be on notice of a potential suit. *Avery*, 132 U.S. at 610-12. Today, bankruptcy trustees' claims are routinely evaluated based on what non-party debtors knew or should have known prior to bankruptcy. *See, e.g.*, *In re Marchese*, Bky. No. 16-13810 ELF, 2018 WL 3472823, at *8 (Bankr. E.D. Pa. July 16, 2018); *In re Stotz Fredenhagen Indus., Inc.*, 554 B.R. 777, 783 (Bankr. D.S.C. 2016); *In re Wagner*, 530 B.R. 695, 705 (Bankr. E.D. Wis. 2015). Similarly, survivors' and estates' claims often turn on the knowledge of the decedent. *See, e.g.*, *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986); *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981); *Georgia-Pacific Corp. v. Benjamin*, 904 A.2d 511, 533-34 (Md. 2006).

Sometimes (as in qui tam actions), the plaintiff-assignee will learn about the fraud before the victim. But the knowledge of the victim remains determinative. *See, e.g.*, *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. KG.*, 510 F.3d 77, 89 (1st Cir. 2007) (reasoning that the statute of limitations should run from the date the copyright purchaser and ultimate plaintiff informed assignors of their potential claims by purchasing them, even though the purchaser learned of those claims earlier); *Haugh v. Allstate Ins. Co.*, 322 F.3d 227, 231 & n.5 (3d Cir. 2003) (where insured party

assigns failure-to-settle claims against his liability insurer to the opposing party, "the critical question" to applying the discovery rule remains when the insured party knew or should have known about the insurer's rejection of the assignee's settlement offer, not the earlier date when the assignee [and current plaintiff] learned that the insurer had rejected his offer).

Petitioners mention the assignor-assignee context only in a footnote, citing four cases supposedly establishing that the assignee's knowledge should trigger the limitations clock. Petr. Br. 43 n.9. In fact, three of the four come out the other way. *See Bierman v. Int'l Bus. Machs. Corp.*, 547 F. App'x 851, 852-53 (9th Cir. 2013) (affirming dismissal of assigned claim because assignee, Bruce Bierman, failed to adduce evidence that the non-party assignor, Sonia Bierman, lacked constructive knowledge of her claim); *SBAM Partners v. Oh*, No. B168187, 2004 WL 2580424, at *5 (Cal. Ct. App. Nov. 12, 2004) (affirming dismissal because SBAM Partners, the plaintiff-assignee, failed to plead facts showing that non-party assignor Seoul Bank lacked constructive knowledge of its claim); *CitiMortgage, Inc. v. Parille*, 49 N.E.3d 869, 884 (Ill. App. Ct. 2016) (holding that the limitations clock started in September 2003, based on facts known or reasonably knowable to a claim's assignor); *id.* at 874 (explaining that the claim was assigned to CitiMortgage, the plaintiff in the case, on July 16, 2010).[4] And the fourth is unrelated; in three short

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[4] Petitioners point to language in *Bierman* and *SBAM* suggesting that the assignee's knowledge is also "relevant," Petr. Br. 43 n.9, but fail to explain why the assignee's knowledge was

paragraphs, it declines to equitably toll a statute of limitations until after a court decision in a related matter, noting along the way that the plaintiff (who happened to be an assignee) had two months to sue after the court decision even without tolling. *Silva v. Allstate Ins. Co.*, 304 F. App'x 609, 611 (9th Cir. 2008).

By tying Section 3731(b)(2) to the victim's knowledge, Congress simply codified the common law rule. The two most populous states have adopted the same rule, further undermining petitioners' allegation of novelty. California's False Claims Act mirrors the federal statute, and its courts have construed it consistent with respondent's interpretation. *State ex rel. Hindin v. Hewlett-Packard Co.*, 62 Cal. Rptr. 3d 762, 764, 766-67 (Cal. Ct. App. 2007). And the Texas statute explicitly specifies that when the "state declines to take over the action," the relator may sue either six years after the fraud occurred or "up to three years from the date *the state* knows or reasonably should have known facts material to the unlawful act, whichever of these two periods is longer." Tex. Hum. Res. Code Ann. § 36.104(b) (emphasis added). In short, Section 3731(b) does not "break new legal ground" or "depart from settled default tolling principles," Petr. Br. 26; it ratifies them.

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relevant. In *Bierman*, the plaintiff was suing on both a claim that originated with him and as an assignee of his mother's claim; he was barred as to both claims because he produced no evidence as to either his or his mother's inability to discover the injury earlier. 547 F. App'x at 852. In *SBAM*, the assignee's post-assignment knowledge was relevant to determining when the clock should start running only if the assignor's pre-assignment knowledge had not already triggered it. No. B168187, 2004 WL 2580424, at *5.

If anything, it is petitioners' interpretation that would create an anomaly. Ordinarily, when a lawsuit is filed, the parties ought to be able to tell whether the statute of limitations has run. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014) (describing statutes of limitations as "foster[ing] . . . 'certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). But under petitioners' interpretation, the applicable statute of limitations in qui tam cases remains in flux until the government makes its intervention decision (often years after the suit is filed). Petitioners do not identify—and we have not discovered—any other statute of limitations that works this way.

B. Respondent's interpretation is most consistent with the purposes of the False Claims Act and the 1986 Amendments.

1. Respondent's interpretation would protect the government's interests and conserve public resources.

The purpose of the FCA and the 1986 Amendments in particular is to enhance the government's ability to recover damages for frauds against it, especially through qui tam actions. Respondent's interpretation serves that purpose by allowing meritorious declined qui tam suits to proceed. Petitioners' interpretation would subvert that purpose by limiting the government's ability to recover and forcing it to expend its own resources instead of relying on private relators.

When Congress amended the statute, qui tam actions were few and far between. S. Rep. No. 99-345,

at 4-6 (1986). Despite the government's own enforcement efforts, the problem of contracting fraud had grown "severe" and was only getting worse. *Id.* at 2. Congress believed that "only a coordinated effort of both the Government and the citizenry w[ould] decrease this wave of defrauding public funds." *Id.* Congress therefore amended the FCA with the express purpose of encouraging relator suits. Such suits facilitate the detection of frauds that the government would otherwise never see while conserving scarce government resources.

Congress's effort succeeded. The 1986 amendments revitalized qui tam litigation, resulting in substantial benefit to the government. Since 1986, the government has recovered more than $42 billion in qui tam actions, including $2.4 billion in cases in which the government declined to intervene. *See* Fraud Statistics - Overview, Civil Div., U.S. Dep't of Justice (Dec. 21, 2018), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

Petitioners' interpretation is at odds with Congress's purpose. First and foremost, under petitioners' rule, the government would surely recover less. Some meritorious cases would be time-barred altogether. And in qui tam actions to combat ongoing fraud, damages would be limited to a six-year window. In fact, petitioners' rule might not just reduce recoveries in these cases, but eliminate them altogether: would-be relators may be deterred from coming forward if they worry that their claims may be time-barred; and they may also have trouble finding a lawyer willing to pursue a case with a compressed

damages window. The government's recoveries would undoubtedly suffer.

It is no answer that the government could rescue these cases by intervening. A relator and his counsel cannot know, in advance, whether the government will intervene, and that uncertainty may deter relators from coming forward. But even assuming that the government would intervene in every meritorious case, that merely highlights another problem with petitioners' interpretation: it would force the government to expend its own resources on cases it could otherwise leave to relators, lest the recoveries be lost altogether. *See* Transcript of Oral Argument at 48-49, *Universal Health Servs., Inc. v. Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7) (explaining that the government would feel "pressured" to intervene if it "believed that courts would draw . . . an adverse inference" from a decision not to). That would undermine the 1986 Congress's desire to save public enforcement resources for cases where they are most needed.

Critically, as petitioners admit, the government makes intervention decisions based on a variety of factors, many unrelated to the merit of the case—including a desire to save resources, confidence in the relator and her counsel, and calculations of expected gain. *See* Petr. Br. 34; Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, on Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A) at 1 (Jan. 10, 2018). In other words, the government often leaves meritorious cases in the hands of relators and their counsel. These declined cases are cost-efficient because the government keeps at least 70% of the

recovery without the expense of litigating the action. *See* 31 U.S.C. § 3730(d). Yet petitioners would single out these cases for the worst treatment. They would also make it impossible for the government to change its mind and intervene later, for good cause. *See id.* § 3730(c)(3).

2. Petitioners' legislative history citations are unpersuasive.

Petitioners have no answer to the legislative history establishing the actual purpose of the 1986 amendments. Instead, they gather snippets of legislative history stating that Section 3731(b)(2) was meant to aid the government by giving it more time. Petr. Br. 35-39. As with petitioners' appeal to statutory "context," none of this evidence suggests, let alone proves, that Congress intended to exclude relators from the provision's ambit. Indeed, as just shown, Congress strongly believed that helping relators helps the government.

At its core, petitioners' argument is this: if the statute works as written, it reaches beyond the problem Congress identified. But even if that were true, "[I]t is not for [the Court] to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [the Court] think[s] Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). It is often the case that a statute "go[es] beyond the principal evil" that Congress sought to address. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

3. Respondent's reading creates no practical difficulties.

Lacking footholds in text, purpose, and history, petitioners turn away from the statute and raise a handful of imagined policy concerns. None are persuasive.

First, petitioners imagine that relators will sit on claims of ongoing fraud to pad the damages. Petr. Br. 28-29. They have not identified a single person who has ever done this. In fact, the FCA incentivizes relators to bring claims of ongoing fraud promptly regardless of the applicable statute of limitations. The prospective relator's claim will be barred if a different relator files a claim based on the same facts. *See* 31 U.S.C. § 3730(b)(5). This first-to-file bar creates a winner-take-all race to the courthouse among all potential relators, creating a uniquely powerful incentive for quick filing. A relator's claim will also be barred if the underlying facts of the fraud are first publicly disclosed in a government "report, hearing, audit, or investigation," or in the news media, unless the government permits the suit to proceed. *See id.* § 3730(e)(4)(A)(ii). And her claim will be barred if the government discovers the fraud on its own and brings "a civil suit or an administrative civil money penalty proceeding." *Id.* § 3730(e)(3). Importantly, all of these provisions address concerns about delay without undermining relators' ability to recover on the government's behalf. Petitioners' rule, on the other hand, would harm the government for the reasons given above.

In any event, petitioners' unsubstantiated supposition that bad faith motivates relators to delay filing is remarkably cynical. *See generally* Peter S.

Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 Calif. L. Rev. 1, 37-44 (2017). A delayed qui tam suit is far more likely to reflect the structural obstacles faced by relators than a relator's bad faith. The ordinary citizen does not know about the FCA and its protections from retaliation, nor exactly when unsavory conduct crosses the line into illegality. Employees of large companies often assume that what they are being directed to do has been vetted by the company and is legal. Likewise, they may have signed a broadly-worded non-disclosure or confidentiality agreement that, on its face, appears to bar whistleblowing. Some workers take years to realize that they are enmeshed in an ongoing fraud—especially when the defendant has been actively concealing it. Still others may only discover fraud belatedly after a transfer or promotion gives them greater insight into the defendant's activity. And most attempt to resolve their concerns internally before deciding to sue. Even then, relators must familiarize themselves with the applicable law, and seek legal counsel on their own—which itself can take significant time.

What's more, the dangers of coming forward are significant and chilling; relators put themselves at risk of retaliation, professional blacklisting, and worse. Many lose their jobs, health insurance, and 401(k) plans. Some face even greater financial devastation, including the loss of their homes. Coming forward can also take a personal toll: filing a relator suit often leads to divorce, stress-induced health problems, and despondency. *See, e.g.*, Sheelah Kolhatkar, *The Personal Toll of Whistleblowing*, The New Yorker (Feb. 4, 2019), https://www.newyorker.com/magazine/2019/

02/04/the-personal-toll-of-whistle-blowing (describing a physician who identified a multimillion dollar fraud scheme, but in the process lost his job and fell into depression); Aaron S. Kesselheim et al., *Whistleblowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 New England J. Med. 1832, 1836 (2010) (describing consequences of whistleblowing, including financial difficulties, divorce, and stress-related health problems "including shingles, psoriasis, autoimmune disorders, panic attacks, asthma, insomnia, temporomandibular joint disorder, migraine headaches, and generalized anxiety").

As an illustration, Jim Holzrichter is one of many who have endured these costs firsthand: he lost his home and almost his life. While working for Northrop Grumman, Mr. Holzrichter discovered extensive fraud in the building of the B-2 stealth bomber. Not only was Northrop inflating the costs of materials, but it was charging the government for material not used and lying about its construction progress. Mr. Holzrichter reported the matter internally, but his company supervisor told him to keep quiet.

He could not. He filed a qui tam suit under the FCA, but his choice almost cost him everything. He lost his job and was blacklisted in the industry. He and his family were homeless until he could earn enough from his new newspaper-delivery job to move them into subsidized housing. The Department of Justice declined to intervene in his suit three years after he filed it, but Mr. Holzrichter pressed on. Nine years later, the government changed its mind and intervened. Four years after that—and a full sixteen years after Mr. Holzrichter filed suit—Northrop

settled for $62 million. *Whistleblower Stories*, Taxpayers Against Fraud, https://taf.org/whistleblower-stories/ (last visited Jan. 25, 2019); Dick Carozza, *Vindication at a high price*, Fraud Magazine, July-Aug. 2015, https://www.fraud-magazine.com/article.aspx?id=4294989043 (last visited Jan. 25, 2019).

Congress in 1986 understood that the only way to stop a wave of fraud against the United States was for courageous whistleblowers like Mr. Holzrichter to step forward. It therefore sought to remove stumbling blocks in relators' paths—not create new ones.

Second, petitioners threaten "burdensome and time-consuming" discovery into the government's knowledge. Petr. Br. 33. But even if faithfully applying Section 3731(b)(2) would result in such discovery, the additional burdens would be minimal. For one, identical discovery already occurs in intervened qui tam suits and government suits relying on Section 3731(b)(2), neither of which would be barred by petitioners' interpretation. And as the Eleventh Circuit noted, government knowledge is often subject to discovery even in declined cases because it "may be relevant to the merits of the relator's FCA claim." Pet. App. 22a n.10. Any additional discovery burden is insignificant and hardly justifies a departure from Section 3731(b)'s plain text. Of course, the government also has the ability to contest overbroad discovery requests in court, and district courts are fully competent to manage that process.

Third, petitioners compare two hypotheticals: one where the "relator learns about fraudulent activity one day after it occurred," and one where the government does. Petr. Br. 26-27. Petitioners assert that the relator in first scenario could have ten years to file a

claim under Section 3731(b)(2) "as long as the government did not learn about the fraud in the interim," but in the second scenario, "the government would have only six years to file suit" under Section 3731(b)(1). *Id.* Petitioners point to these two scenarios to allege that the "Eleventh Circuit's rule would lead to the anomalous result that relators would have a longer period to sue than the government in some scenarios." Petr. Br. 26. That is incorrect. When the relator has the benefit of Section 3731(b)(2), so does the government, because the government retains the right to intervene in the case. 31 U.S.C. § 3730(b)(4). In any event, as explained above, relators have every incentive to file their claims promptly.

II. A qui tam relator is not "the official of the United States charged with responsibility to act in the circumstances."

A. The plain text of the statute forecloses petitioners' alternative argument.

Having just argued that Section 3731(b)(2) is unavailable to relators because the statute "refers only to an 'official of the United States,'" Petr. Br. 10, petitioners try out the polar opposite idea. Now, they urge that relators *are* officials of the United States, and that the three-year limitations period begins with their knowledge of fraud—but only once the government declines to intervene. Petr. Br. 40. That tortured interpretation is, petitioners say, "compelled by the broader statutory context in which the provision must be read"—but only if the Court "decides that relators are permitted to invoke Section 3731(b)(2)." *Id.*

The words Congress used in Section 3731(b)(2) could hardly be clearer. That provision offers an

alternative three-year limitations period that begins when facts material to a false claims action are actually or constructively known by "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). Congress could have used language starting the clock when "the person bringing the action" or "the plaintiff" learns of fraud against the government. It also could have created different statutes of limitations depending on whether the government had intervened. But it did not.

Simply put, only government employees—not relators—can be "official[s] of the United States." An "official" is "[s]omeone who holds or is invested with a public office" or who is "elected or appointed to carry out some portion of a government's sovereign powers." *Official*, Black's Law Dictionary (10th ed. 2014). That definition is especially appropriate here, where the statute refers to not any official, but specifically to an official "of the United States." After all, the FCA consistently distinguishes between relators and the government. *See, e.g.*, 31 U.S.C. § 3730(b)(1) (referring to qui tam actions as "[a]ctions by private persons"); *id.* § 3730(c)(3) (providing that "[i]f the *Government* elects not to proceed" with a qui tam action, "the *person who initiated the action*"—*i.e.*, the relator—"shall have the right to conduct the action" (emphasis added)); *see also id.* §§ 3730(b)(5), 3730(c)(2)(A)-(B), 3730(c)(4), 3730(d). And as petitioners concede, Section 3731(b)(2) "does not expressly mention relators" at all. Petr. Br. 18; *see also* Petr. Br. 40. The only plausible conclusion is that the three-year limitations period does not turn on a relator's knowledge.

Nevertheless, petitioners contend that "official of the United States" is broad enough to encompass private persons acting in the government's interest. *See* Petr. Br. 41. For support, petitioners point to a statute criminalizing bribery of a "public official," defined broadly to include "an officer or employee or person acting for or on behalf of the United States." 18 U.S.C. § 201(a)(1). But this statutory definition of a markedly different term applies only "[f]or the purpose of [section 201]." *Id.* § 201(a). Besides, the broad definition of "public official" in Section 201 is an outlier: similar terminology in other statutes clearly refers to government officials. *See, e.g.*, 5 U.S.C. § 3110(a); 25 U.S.C. § 2806(d); 41 U.S.C. § 2101(5). At any rate, Section 201's expansive definition shows that Congress knows how to give a term broader sweep than its ordinary meaning would suggest—something it declined to do for purposes of Section 3731(b)(2). *Cf. Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Independently, the FCA cannot be read to "charge[]" relators "with responsibility" to combat fraud. It speaks permissively, stating that relators "*may* bring a civil action for a violation of section 3729," 31 U.S.C. § 3730(b)(1) (emphasis added), and that they "shall have the *right* to conduct the action" if the government declines to intervene, *id.* § 3730(c)(3) (emphasis added). This permissive language contrasts with the language used to describe the obligations of government officials. *See id.* § 3730(a) (mandating that "[t]he Attorney General diligently *shall* investigate a violation under section 3729") (emphasis added). In

short, the Act empowers relators to bring suits to combat fraud, but does not "charge" them with the "responsibility" for doing so. Congress left that duty to government officials.

That's not all. Section 3731(b)(2) refers not to *any* official of the United States, but to "*the*" responsible official of the United States. *Id.* § 3731(b)(2) (emphasis added). Thus, the statute refers to a *specific* official. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("[U]se of the definite article . . . indicates that there is generally only one proper respondent . . . ."). Yet as petitioners would have it, the identity of the official charged with responsibility to act changes the moment the government declines to intervene in a relator's suit, when the relator supposedly becomes *the* official—and nobody actually employed by the government is responsible to act. What's more, the responsibility might revert to the government if it belatedly decides to intervene for "good cause." 31 U.S.C. § 3730(c)(3). That is nonsense. After all, Section 3731(b)(2) does not even mention the intervention decision, let alone make it determinative of the relevant official's identity.

B. Petitioners' interpretation leads to absurd results.

For a related reason, petitioners' interpretation leads to absurd results. According to petitioners, a relator becomes the relevant "official of the United States" *after* the United States declines to intervene in a qui tam action. Petr. Br. 40. In petitioners' view, the declination decision functions as a *de facto* appointment that turns the private relator into a government official.

If that is correct, the three-year discovery period, which begins to run on "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States," would start on the date of declination, *i.e.*, the date the relator became a government official. 31 U.S.C. § 3731(b)(2). But the date of declination invariably falls after the lawsuit has already been filed—which means that the lawsuit was necessarily timely, because it was filed before the three-year period even began to run. Consequently, every declined qui tam action would be subject only to a ten-year limitations period, with no accompanying discovery rule. Congress could not have intended that implication.

Petitioners have no way around this problem. They might argue that even though the relator was not a government official when he learned of the fraud, his knowledge nevertheless had triggered the statute of limitations—unbeknownst to anybody, and only once the government subsequently declined to intervene. But it would be bizarre for a private person's knowledge to trigger the limitations period for the United States, even if that person later became a government official. For example, if a private attorney who had known for two years about a long-running fraud joined the Department of Justice's Civil Fraud Section (or otherwise became a responsible "official of the United States"), the government surely would not have only one year to sue. And if the attorney had known about the fraud for five years, the government's claim would not be automatically time-barred. Instead, in either case, the government would have three years from the date the attorney was hired into the government. The same is true here: if, as petitioners

argue, the relator becomes a government official upon declination, then any three-year clock triggered by the relator's knowledge must start on the date of declination, and not before.

* * *

In effect, petitioners plead for this Court to ignore the statutory text and instead read the phrase "the official of the United States charged with responsibility to act in the circumstances" to mean "any plaintiff." But if Congress intended that result, it would have been easy to write the statute that way. It did not.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC., AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of § 3731(b)(2).

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important False Claims Act cases. See, e.g., *Univ. Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010).

Government fraud investigations are usually long—sometimes *very* long. Recognizing this, Congress, in 1986, amended the False Claims Act's statute of limitations to ensure that the government has ample time to conduct an investigation and decide whether to act. The old statute of limitations—still in place—supplies a flat six-year period within which to sue. The 1986 amendment adds that, within a *ten*-year outer boundary, the government may sue within three years of when it learns or should learn of a fraud against it.

Although she may sue as a relator under the False Claims Act, a private party does not—or, at least, should not—need an unusually lengthy limitation period. She hardly need investigate her claims, the details of which she typically knows firsthand; nor need she run them through a

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented to the brief's being filed.

government bureaucracy. She can cut to the quick and sue. It is clear therefore that Congress did not have her in mind when it added a ten-year repose provision.

When a relator sues under the False Claims Act, her complaint remains under seal while the government considers whether to intervene in the lawsuit. Although it is supposed to spend no more than a few months deciding whether to intervene, the government often takes several years. (To repeat: government investigations are usually long.) If a relator may wait up to ten years to sue, and the government may *then* spend several years investigating, before a complaint is served on the defendant, serious due-process concerns arise. It should not be lightly assumed that Congress intended to let a dozen or more years pass before a fraud defendant is first instructed in the accusations against it.

WLF urges the Court to restrict relators to the False Claims Act's original, and abundant, six-year limitation period.

STATEMENT OF THE CASE

After invading Iraq in 2003, the United States hired The Parsons Corporation to collect munitions Iraqi forces had abandoned as they retreated or surrendered. Pet. App. 3a. Parsons, in turn, needed to hire someone to secure the cleanup sites. Cochise Consultancy, Inc., allegedly bribed individuals at Parsons and in the Army Corps of Engineers to ensure that it won the security sub-contract. *Id.* at

3a-5a. Cochise supplied the pertinent security service from February to September 2006. *Id.* at 5a.

Billy Joe Hunt worked on Parsons's cleanup project. *Id.* at 3a. On November 30, 2010, Hunt told the FBI about Cochise's alleged bribes. *Id.* at 5a. He then went to prison for his part in a separate kickback and tax-fraud scheme. *Id.*; Department of Justice, *Two U.S. Contractor Employees Sentenced for Kickback Conspiracy and Tax Crimes Related to Iraq Reconstruction Efforts*, https://perma.cc/KS8Y-YNJZ (Oct. 10, 2012). After leaving prison, he sued Parsons and Cochise under the False Claims Act.

The False Claims Act sets forth, at 31 U.S.C. § 3730, two distinct rights of action. First, the United States may sue on its own behalf. *Id.* at § 3730(a). Second, a private party may bring a *qui tam* action—that is, an action in which, proceeding as a "relator," the party acts in the government's name. *Id.* at § 3730(b)(1). A relator files her action under seal, so that the government can investigate her claims and decide whether to intervene in (and, in effect, take over) the lawsuit. *Id.* at § 3730(b)(2). In Hunt's case the government declined to intervene.

Hunt filed his complaint on November 27, 2013, more than six years after the alleged fraud occurred, and more than three years after Hunt discovered it. This timing matters, because the False Claims Act's statute of limitations, 31 U.S.C. § 3731(b), provides:

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 [i.e., the fraud] is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

In short, § 3731(b) contains (1) a six-year limitation period and (2) a three-year limitation period cabined by a ten-year repose period. See generally *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-10 (2014) (discussing the distinction between a limitation period and a repose period). But cf. *United States ex rel. Tracy v. Emigration Improvement Dist.*, 2018 WL 3111687 *3 n.5 (D. Utah June 22, 2018) (concluding that § 3731(b)(1)'s six-year period is, like § 3731(b)(2)'s ten-year period, a period of repose).

Under § 3731(b)(1), Hunt's action is barred: Hunt filed more than six years "after the date" of the alleged "violation." Under § 3731(b)(2), however, things are more complicated. No one disputes that Hunt sued within ten years of Parsons's and Cochise's alleged fraud. But Hunt must also establish both (1) that he may invoke § 3731(b)(2) in

the first place and (2) that the pertinent "official of the United States" learned of the alleged violation less than three years before Hunt sued.

Granting motions to dismiss, the district court concluded that Hunt cannot overcome these hurdles. In the trial court's view, either only the United States may invoke § 3731(b)(2), or Hunt is himself the relevant "official of the United States" whose knowledge of the alleged violation triggered the three-year limitation clock. Pet. App. 37a-39a & n.6.

The Eleventh Circuit reversed. Allowing Hunt to invoke § 3731(b)(2), it concluded that "the phrase 'civil action under section 3730' ... includes § 3730(b) *qui tam* actions when the government declines to intervene." Pet. App. 14a. And it declared that the three-year limitation period in § 3731(b)(2) can be triggered only by a true "official of the United States"—not by a relator acting on the United States' behalf. *Id.* at 29a-31a.

This Court agreed to decide both "whether a relator ... may rely on ... § 3731(b)(2)" and "whether the relator constitutes an 'official of the United States' for purposes of [that] section." (Pet. Br. i.) We address only the first of these two issues.

SUMMARY OF ARGUMENT

There are a number of signs that only the government may invoke § 3731(b)(2). For one thing, § 3731(b)(2) "refers only to the United States—and not to relators." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). For another thing, letting a relator invoke

§ 3731(b)(2) would "produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *Id.* And Congress appears to have lifted the language in § 3731(b)(2) directly from a tolling statute "that applies only to actions brought by the government." *Id.* at 294. These points, and more, are ably presented by Parsons and Cochise.

We write to expand on one reason, and to add another, why § 3731(b)(2) is unavailable to relators:

1. The point of allowing *qui tam* actions is to incentivize private parties promptly to raise claims of fraud against the government. Once she learns of fraudulent conduct, a private party can, more or less, proceed straight to filing a lawsuit under the False Claims Act. The government cannot act with such dispatch. Before suing, it must conduct a multi-agency investigation, compile the work of numerous officials, and run the proposed lawsuit through a formal approval process. The ten-year repose period in § 3731(b)(2) ensures that the government can, in most cases, complete its pre-lawsuit peregrinations and still file a timely complaint. That repose period serves no comparable purpose for a private party.

2. A government investigation is a common feature of a private *qui tam* action and a government False Claims Act action. There is, however, a key distinction: when the government sues, the investigation *precedes* the lawsuit; whereas when a relator sues, the investigation usually *follows* the lawsuit. When the government sues at the edge of a ten-year period, the time between the events at issue

and the commencement of the lawsuit is—about ten years. But if a relator sues at the edge of such a period, the lawsuit is likely still *years away* from commencing. The lawsuit will remain under seal, and the defendant ignorant of the claims against it, while the government investigates the relator's claims and decides whether to intervene. So although the repose period in a government lawsuit is never more than the ten years set forth in § 3731(b)(2), that period could in a private lawsuit stretch—in defiance of the statute's text ("*in no event* more than 10 years")—without limit. It could stretch for ten years plus as long as the government cares to investigate—in other words, a mighty long time.

Not only does the defendant have no right to receive notice of the allegations against it while the lawsuit is under seal; it has no right to conduct discovery parallel to the government's investigation. When the lawsuit is unsealed many years after the events in question, the government is armed with all the evidence it needs, while the defendant must begin compiling its (incredibly stale) evidence from scratch.

Allowing a private party to invoke § 3731(b)(2) creates a lopsided litigation protocol, in which every advantage rests with the relator and the government. If today the Court opens § 3731(b)(2) to private parties, tomorrow it will have to decide whether the Due Process Clause has anything to say—as it almost surely does—about letting the government complete unilateral discovery before serving a complaint full of moldy allegations. Rather than invite such an issue, the Court should simply adopt the more sensible reading of

§ 3731(b)(2), under which only the government may (at times) take up to ten years to sue.

ARGUMENT

I. THE SECOND OF THE FCA'S TWO LIMITATION PERIODS SERVES A DISTINCT END FOR A DISTINCT PARTY.

The debate over whether a private party may invoke § 3731(b)(2) centers on statutory text. This, of course, is just as it should be. And the text is plain. The three-year limitation period in § 3731(b)(2) begins to run when "facts material to the right of action" become known, or reasonably knowable, to "the *official of the United States* charged with responsibility to act in the circumstances" (emphasis added). Section 3731(b)(2) points directly at the party that may invoke § 3731(b)(2)—the United States.

And as Parsons and Cochise thoroughly explain, the False Claims Act's structure and purpose confirm what § 3731(b)'s text makes clear: a private party has six years, not up to ten, to bring a *qui tam* action.

But after the many strong interpretive grounds for accepting Parsons's and Cochise's position have been reviewed, it is still worth asking a simple question. The False Claims Act long contained one limitation period—the six-year period that today resides in § 3731(b)(1). Then, in 1986, Congress added the alternative period that resides in § 3731(b)(2). The question is this: Why would

Congress place two distinct limitation periods in the False Claims Act?

The answer is as obvious as it is compelling: the government moves slowly.

The False Claims Act says that "the Attorney General diligently shall investigate" claims of fraud against the government. 31 U.S.C. § 3730(a). It is not in the nature of a "diligent" government investigation to proceed quickly, and investigations under the False Claims Act are no exception. In investigating allegations of fraud, the Department of Justice's Fraud Section must "work closely with the Department of Justice's Criminal Division, US [Attorneys Offices], the Federal Bureau of Investigation, and the Offices of the Inspectors General of [government] agencies." Department of Justice, *Fraud Section*, https://perma.cc/3BXV-GVXD (Oct. 20, 2014). To assist the Fraud Section, the pertinent government agencies must, in turn, "enlist a myriad of [their] own program officials," "quality assurance representatives," and "other knowledgeable witnesses" to evaluate the allegations. Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for* Qui Tam *Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901, 919 (Spring 2015). The government will likely also question the alleged fraudster; the False Claims Act empowers the government to conduct such one-sided discovery without filing a lawsuit. 31 U.S.C. § 3733. If all this investigating reveals that fraud likely occurred, the government will conduct a final review process before the Fraud Section's director formally approves the filing of a lawsuit. See Hesch, supra, at 919.

All told, the government is likely to need "months or years of investigations, interviews, subpoenas, and discussions with defense counsel" before it is ready to file a complaint. Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1565 (Summer 2015). It can take "between *three and six years* for the government to properly investigate and bring a complex fraud case." Hesch, supra, at 903 (emphasis added).

While considering what came to be the 1986 amendments to the False Claims Act, the House Judiciary Committee heard testimony from the head of the Department of Justice's Civil Division. He informed the committee that a six-year limitation period is sometimes too short to accommodate the slow-moving gears of government:

> I can say[,] Mr. Chairman, that I frequently see requests to sue come in right on the brink of the [six-year] statute of limitations, and sometimes beyond, . . . because it has just taken that long to discover the fraud *and get a case ready to pursue*. [A longer limitation period] would give *us* a little more flexibility in bringing some cases that otherwise would be barred.

United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 724 n.31 (10th Cir. 2006) (emphasis added) (quoting *False Claims Act Amendments: Hearings Before the H. Subcomm. On Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 118, 159

(1986)). Congress obliged the government and created the three-year discovery rule and ten-year repose in § 3731(b)(2).

A relator's situation is something else altogether. A relator need not wait while his accusations percolate through a bureaucracy. Nor need he conduct a lengthy investigation; usually, in fact, he is a firsthand witness of the alleged fraud. To begin his lawsuit, he need do little more than choose an attorney, tell her the details of the case, and sign the contingency-fee agreement. His lawyer can trot into the courthouse before the federal prosecutor has laced her shoes.

A *qui tam* action "compare[s] with the ordinary methods as the enterprising privateer does to the slow-going public vessel." *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). It makes no sense, therefore, to assume that § 3731(b)(2), with its ten-year repose period, is available equally to the government and to private parties. To the contrary, the only safe assumption is that Congress added § 3731(b)(2) to accommodate plodding government investigations. Congress granted the government extra time to shoulder its unique investigative burden.

II. THE FCA'S STATUTE OF LIMITATIONS MUST BE READ IN HARMONY WITH THE FCA'S SEAL PROVISION.

The False Claims Act authorizes the government to investigate the allegations in a *qui tam* action *after* the action begins, but *before* the action is disclosed. The government is empowered, in effect, to

spend months or even years conducting discovery before the defendant may even read the complaint. This constitutionally suspect arrangement becomes constitutionally intolerable if a relator may, by invoking § 3731(b)(2), take up to ten years simply to *file* the lawsuit that *starts* the government's lengthy, intrusive, one-sided, secret investigation. At the very least, allowing a relator up to ten years to file suit creates constitutional problems that are best avoided.

A. The FCA's Seal Provision Creates Due-Process Concerns.

Section 3731(b)(2) was just one of several provisions Congress added to the False Claims Act in 1986. It also added (among other things) a rule requiring a relator to file her complaint under seal. The rule states that "the complaint shall be filed in camera"; that it "shall remain under seal for at least 60 days"; and that it "shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

The seal rule's primary purpose is to keep the defendant in the dark while the government investigates the relator's claim and decides whether to intervene in the suit. "By design, the seal provision . . . deprives the defendant in an FCA suit of the notice usually given by a complaint." *United States v. The Baylor Univ. Med. Ctr.*, 469 F.3d 263, 270 (2d Cir. 2006), superseded by statute on other grounds, 31 U.S.C. § 3731(c).

Congress understood that not every investigation can be completed within 60 days, and so it

authorized the trial court, on the government's motion and "for good cause shown," to extend the seal. *Id.* § 3730(b)(3). Congress placed no limit on either the number of extensions the government may obtain or the time the complaint may remain under seal. But in "the vast majority of cases," the Senate Judiciary Committee opined, "60 days is an adequate amount of time to allow Government coordination, review, and [a] decision" on whether to intervene. S.Rep. No. 99-345 (1986). "Good cause" for extending the seal, the committee continued, should "not be established merely upon a showing that the Government [i]s overburdened." *Id.* The committee expected the trial court to "weigh carefully" each government request to extend a seal. *Id.*

In spite of this guidance, the government often asks for many extensions, and the trial court often grants these *ex parte* requests with little scrutiny. In consequence False Claims Act lawsuits often remain under seal for years on end. See, e.g., *Baylor*, 469 F.3d at 266 (sixteen *ex parte* extension requests granted, resulting in an eight-year seal); *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 392 (D. Mass. 2007) ("numerous" extensions; nine-year seal); *United States ex rel. Sarmont v. Target Corp.*, 2003 WL 22389119 *1-*2 (N.D. Ill. Oct. 20, 2003) (fifteen extensions; seven-year seal); *United States ex rel. Lee v. Horizon West, Inc.*, 2006 WL 305966 *1 (N.D. Cal. Feb. 8, 2006) (five-year seal); see also *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 263 (4th Cir. 2011) (Gregory, J., dissenting) (noting that the 60-day limit "is largely illusory" and that many FCA cases "are under seal for at least two years").

While the seal is in place, the government may conduct depositions and serve interrogatories and requests for documents. 31 U.S.C. § 3733. And if the government decides, at long last, to intervene, its complaint will relate back to when the relator filed her complaint. 31 U.S.C. § 3731(c). So the government—assuming it can convince the trial court to go along (and it often can)—may continue its investigation indefinitely, free of pressure from any statute of limitations. The defendant has no reciprocal discovery rights. Nor is it entitled to know the nature of the allegations driving the government's investigation.

"There is a very real danger" that, under this regime of closed judicial proceedings, intrusive but unexplained government inquiries, and years-long delays, "defendants' due process rights have [been] and will be violated." Laura Hough, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 Wm. & Mary Bill Rts. J. 1061, 1089 (May 2011).

B. The FCA's Statute Of Limitations Should Not Be Read To Exacerbate The Due-Process Concerns Created By The FCA's Seal Provision.

So the False Claims Act's seal provision is on shaky constitutional ground. The question arises, then, whether any particular reading of the Act's statute of limitations aggravates the constitutional problem.

When the United States brings a False Claims Act suit on its own behalf, the government's investigation of the alleged fraud precedes the action. Once the lawsuit begins, it begins in earnest. Although the ten-year repose period in § 3731(b)(2) is long, that period is—if the government is the plaintiff—the maximum delay that can pass before the defendant learns of the lawsuit and can begin building a defense.

If a private party may use § 3731(b)(2)'s ten-year repose period, the picture is very different. When a relator sues, the lawsuit typically *starts* the government investigation. If a relator may rely on § 3731(b)(2), a defendant can (1) discover it is the target of a government investigation of events that occurred more than a decade ago yet (2) still be several years away from learning the allegations against it. It is quite conceivable that some defendants will not be handed a complaint until 15 or more years after the events in dispute.

True, recognizing that "defendants have a legitimate interest in building their defense while the evidence is still fresh," some district judges will eventually lift a seal against the government's wishes. *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997) (lifting an eighteen-month FCA seal *sua sponte*). But no one is present to press the defendant's interests, and experience shows that, lacking an adversarial presentation of the issues, many judges will simply defer to the government. Left to its own devices, the government will often make a mockery of Congress's insistence that most investigations wrap up within 60 days or so.

The end of a repose period is normally a definitive cutoff, after which a defendant may "put past events behind him." *Waldburger*, 573 U.S. at 9. Unlike a limitation period, which can be tolled, a repose period is "an absolute bar on a defendant's temporal liability." *Id.* at 8. Yet if a relator may invoke § 3731(b)(2), that section's repose period is *not* definitive and *not* absolute. Instead of setting past events aside at the ten-year mark, a potential defendant would have to spend an indeterminate number of years more being wary of an ambush complaint. That is not "repose."

As time passes, moreover, "evidence spoils, memories fade, and prejudice may result." *Pharm. Indus.*, 498 F. Supp. 2d at 399 n.6. And the prejudice is compounded by the parties' asymmetrical access to evidence. The government may complete a full investigation—and share what it has learned with the relator, see 31 U.S.C. § 3733(a)(1)—before the defendant even knows what the allegations are. Sometimes, it seems, the government will even build its whole case and only then, when it is good and ready, let the defendant in on the lawsuit. See *Costa*, 955 F. Supp. at 1190 ("The government appears to be fully engaged in its discovery, without giving the defendants the opportunity even to answer the complaint."). When the years have passed and the seal is lifted, the government's key witnesses will have been interviewed. At least some of the defendant's key witnesses, meanwhile, will be retired, remote, reclusive, senile, or deceased. The longer the delay, the fewer witnesses available.

At some point the "egregious delay" created by a *qui tam* seal, along with the one-sided discovery that occurs while the seal is in place, becomes "sufficiently prejudicial" to violate the defendant's right to due process. *Pharm. Indus.*, 498 F. Supp. 2d at 399. When does such prejudice graduate from merely unfortunate to flatly unconstitutional? Congress's answer, at least, is right in the statute. Section 3731(b) resolves the equation *alleged false claim + x years + sealed lawsuit + lengthy one-sided government investigation + service of complaint = constitutional*. According to § 3731(b), *x* may equal six but not ten. Ten years is allowed only when *x years* and *lengthy one-sided government investigation* are combined into one overlapping period.

One way or the other, a government investigation is going to introduce delay into a False Claims Act dispute. The most sensible reading of § 3731(b)(2) is as a license for the government to introduce that delay *before* a False Claims Act suit begins. Under such a reading, § 3731(b)(2) is unavailable to a private party.

Tardy relators regularly test the outer bounds of the False Claims Act's statute of limitations (see, e.g., *Sanders*, 546 F.3d at 296 [collecting examples]), and the government regularly tests the outer bounds of its investigative authority (see the examples of lengthy seals, above). So if the Court eschews the narrower, government-only reading of § 3731(b)(2), it will one day have to decide whether unsealing a complaint containing 12-, 15-, or 18-year-old allegations violates due process. The Court should instead "construe the statute to avoid constitutional

problems." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). Even if the broader and narrower readings of § 3731(b)(2) stand in equipoise—they don't—the narrower reading should govern.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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